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ABSTRACT

This document presents and explains Executive Order 11246, the order prohibiting discrimination under federal contracts in colleges and universities. Part one of the document describes the legal provisions of the order; part two deals with personnel policies and practices including recruitment, hiring, anti-nepotism policies, training, promotion, termination, fringe benefits, child care, and grievance procedures; and part three offers suggestions for the development of affirmative action programs on college and university campuses. (HS)

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HIGHER EDUCATION GUIDELINES

EXECUTIVE ORDER 11246

U.S. DEPARTMENT OF HEALTH
EDUCATION & WELFARE
OFFICE OF EDUCATION
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U. S. DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE

OFFICE OF THE SECRETARY
Office for Civil Rights

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HIGHER EDUCATION GUIDELINES

EXECUTIVE ORDER 11246

U. S. DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
Office for Civil Rights

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20201

October 1, 1972

MEMORANDUM TO COLLEGE AND UNIVERSITY PRESIDENTS

As the new academic year begins, I wish to bring to your attention the requirement that all universities and colleges with Federal contracts comply with Executive Order 11246, ''Nondiscrimination Under Federal Contracts.'' We expect that all affected colleges and universities will henceforth be in compliance with the Order and its implementing regulations as stated in the following guidelines.

While these guidelines address themselves to compliance with the Executive Order, for your information we have also attached as appendices other civil rights laws affecting institutions of higher education and over which this Office has enforcement responsibility.

We hope that you will become familiar with these guidelines and laws and direct your staff and faculty to make every effort to abide by them.

The Department of Health, Education, and Welfare stands ready to assist in every way possible so that all institutions of higher education will be able to meet the requirements of the Executive Order and other Federal requirements regarding nondiscriminatory treatment.

Additional copies of these guidelines are available from the Regional Office for Civil Rights in your area or from the Public Information Office, Office for Civil Rights, Department of Health, Education, and Welfare, Washington, D.C. 20201.

J. Stanley Pottinger

J. Stanley Pottinger
Director, Office for Civil Rights

Attachments

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I. LEGAL PROVISIONS

The Office for Civil Rights (OCR) in the Department of Health, Education, and Welfare (HEW) is responsible for the enforcement in institutions of higher education of Executive Order 11246, as amended by Executive Order 11375 (Tab A), which imposes equal employment opportunity requirements upon Federal contractors, and upon construction contractors on projects receiving Federal assistance from HEW.

Executive Order 11246, as amended

In signing a Government contract or subcontract in excess of $10,000 the contractor agrees that it ‘‘will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin,’’ and that it ‘‘will take affirmative action to ensure that applicants are employed and that employees are treated during employment’’ without regard to these factors. In the event of the contractor's noncompliance with the nondiscrimination clauses of the contract, or with the rules and regulations of the Secretary of Labor, the contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts.

Part II of the Executive Order sets forth other contractor obligations, enforcement procedures, and administrative responsibilities. Part III of the Executive Order describes the equal opportunity obligations of applicants for Federal assistance involving construction.

The equal employment opportunity obligations of Federal contractors apply to all employment by a contractor, and not solely to employment associated with the receipt or use of Federal funds. The specific obligations of nondiscrimination and affirmative action associated with the Executive Order apply and are enforceable by the Office for Civil Rights only in the case of contracts, not grants.*

Regulations of the Department of Labor

The requirements of the Executive Order are implemented by the regulations of the Department of Labor (41 Code of Federal Regulations Chapter 60). Part 60-1, ‘‘Obligations of Contractors and Subcontractors’’ (Tab B), sets forth matters of general applicability, including the scope of coverage of the Executive Order, the obligations of employers subject to that coverage, administrative requirements applicable to Federal agencies, steps in investigation and enforcement of compliance with the Order, and guidance for filing complaints of discrimination. Sanctions and OCR investigative procedures are discussed at Tab I.

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*Where a grantee of funds for construction participates in construction under the grant, its employment is subject to the requirements of the equal opportunity clause during the term of participation. When such grantee or applicant for Federal funds is an agency or instrumentality of a state or local government, only such agency or instrumentality is subject to the clause.

Revised Order No. 4 and Non-public Institutions

Revised Order No. 4 (Part 60-2) (Tab C), which implements and supplements Section 60-1.40 of Part 60-1, requires each private institution contractor with 50 or more employees and a contract in excess of $50,000 to develop and maintain a written affirmative action program within 120 days of receipt of such a contract. Section 60-1.40 and Revised Order No. 4 set forth the required contents of such a program, including directions for analyses of the contractor's work force and employment practices, steps to be taken to improve recruitment, hiring, and promotion of minority persons and women, and other specific procedures to assure equal employment opportunity.

Revised Order No. 4 and Public Institutions

While all contractors, both public and private, are required to implement an affirmative action program, at present the basic requirement of Revised Order No. 4 that a contractor maintain a written affirmative action plan is not applicable to public institutions (those under state or local control) (see 41 CFR 60-1.5(a)(4)). Public institutions are nevertheless required to take action to ensure nondiscrimination and to comply with the Executive Order and regulations other than Order No. 4. In our judgment, a public institution can best carry out these obligations by conducting the kinds of analyses required of non-public institutions, and organizing in written form its plans to overcome problems of past discrimination.

In addition, the regulations which set forth the procedures for conducting compliance reviews of all contractors, including public institutions, require written commitments as to ''the precise actions to be taken and dates for completion'' to overcome any deficiencies which a compliance review identifies (41 CFR 60-1.20). These ''precise actions'' and ''dates for completion,'' which must be provided in writing by a public institution following an HEW compliance review, will ordinarily be similar in content to the written affirmative action commitments required as a matter of regulation of non-public institutions (41 CFR 60-2.11).

On October 4, 1972, the Department of Labor will announce in the Federal Register its intention to amend the regulations to remove the present exemption of public educational institutions from the requirement of maintaining a written affirmative action plan. When effective, all educational institutions, both public and private, will have the same affirmative action obligations under the Executive Order.

Nondiscrimination and Affirmative Action in the Executive Order

Executive Order 11246 embodies two concepts: nondiscrimination and affirmative action.

Nondiscrimination requires the elimination of all existing discriminatory conditions, whether purposeful or inadvertent. A university contractor must carefully and systematically examine all of its employment policies to be sure that they do not, if implemented as stated, operate to the detriment of any persons on grounds of race, color, religion, sex or national origin. The contractor must also ensure that the practices of those responsible in matters of employment, including all supervisors, are nondiscriminatory.

Affirmative action requires the contractor to do more than ensure employment neutrality with regard to race, color, religion, sex, and national origin. As the phrase implies, affirmative action requires the employer to make additional efforts to recruit, employ and promote qualified members of groups formerly excluded, even if that exclusion cannot be traced to particular discriminatory actions on the part of the employer. The premise of the affirmative action concept of the Executive Order is that unless positive action is undertaken to overcome the effects of systemic institutional forms of exclusion and discrimination, a benign neutrality in employment practices will tend to perpetuate the *status quo ante* indefinitely.

Who is Protected by the Executive Order

The nondiscrimination requirements of the Executive Order apply to *all* persons, whether or not the individual is a member of a conventionally defined ''minority group.'' In other words, *no* person may be denied employment or related benefits on grounds of his or her race, color, religion, sex, or national origin.

The affirmative action requirements of determining underutilization, setting goals and timetables and taking related action as detailed in Revised Order No. 4 were designed to further employment opportunity for women and minorities. Minorities are defined by the Department of Labor as Negroes, Spanish-surnamed, American Indians, and Orientals.

Goals and Timetables

As a part of the affirmative action obligation, Revised Order No. 4 requires a contractor to determine whether women and minorities are ''underutilized'' in its employee work force and, if that is the case, to develop as a part of its affirmative action program specific goals and timetables designed to overcome that underutilization. (See Tab J) Underutilization is defined in the regulations as ''having fewer women or minorities in a particular job than would reasonably be expected by their availability.''

Goals are projected levels of achievement resulting from an analysis by the contractor of its deficiencies, and of what it can reasonably do to remedy them, given the availability of qualified minorities and women and the expected turnover in its work force. Establishing goals should be coupled with the adoption of genuine and effective techniques and procedures to locate qualified members of groups which have previously been denied opportunities for employment or advancement and to eliminate obstacles within the structure and operation of the institution (e.g. discriminatory hiring or promotion standards) which have prevented members of certain groups from securing employment or advancement.

The achievement of goals is not the sole measurement of a contractor's compliance, but represents a primary threshhold for determining a contractor's level of performance and whether an issue of compliance exists. If the contractor falls short of its goals at the end of the period it has set, that failure in itself does not require a conclusion of noncompliance. It does, however, require a determination by the contractor as to why the failure occurred. If the goals were not met because the number of employment openings was inaccurately estimated, or because of changed employment market conditions or the unavailability of women and minorities with the specific qualifications needed, but the record discloses that the contractor followed its affirmative action program, it has complied with the letter and spirit of the Executive Order. If, on the other hand, it appears that the cause for failure was an inattention to the nondiscrimination and affirmative action policies and procedures set by the contractor, then the contractor may be found out of compliance. It should be emphasized that while goals are required, quotas are neither required nor permitted by the Executive Order. When used correctly, goals are an indicator of probable compliance and achievement, not a rigid or exclusive measure of performance.

Nothing in the Executive Order requires that a university contractor eliminate or dilute standards which are necessary to the successful performance of the institution's educational and research functions. The affirmative action concept does not require that a university employ or promote any persons who are unqualified. The concept does require, however, that any standards or criteria which have had the effect of excluding women and minorities be eliminated, unless the contractor can demonstrate that such criteria are conditions of successful performance in the particular position involved.

II. PERSONNEL POLICIES AND PRACTICES

An employer must establish in reasonable detail and make available upon request the standards and procedures which govern all employment practices in the operation of each organizational unit, including any tests in use and the criteria by which qualifications for appointment, retention, or promotion are judged. It should be determined whether such standards and criteria are valid predictors of job performance, including whether they are relevant to the duties of the particular position in question. This requirement should not ignore or obviate the range of permissible discretion which has characterized employment judgments, particularly in the academic area. Where such discretion appears to have operated to deny equality of opportunity, however, it must be subjected to rigorous examination and its discriminatory effects eliminated. There are real and proper limits on the extent to which criteria for academic employment can be explicitly articulated; however, the absence of any articulation of such criteria provides opportunities for arbitrary and discriminatory employment decisions.

Recruitment

Recruitment is the process by which an institution or department within an institution develops an applicant pool from which hiring decisions are made. Recruitment may be an active process, in which the institution seeks to communicate its employment needs to candidates through advertisement, word-of-mouth notification to graduate schools or other training programs, disciplinary conventions or job registers. Recruitment may also be the passive function of including in the applicant pool those persons who on their own initiative or by unsolicited recommendation apply to the institution for a position.

In both academic and nonacademic areas, universities must recruit women and minority persons as actively as they have recruited white males. Some universities, for example, have tended to recruit heavily at institutions graduating exclusively or predominantly non-minority males, and have failed to advertise in media which would reach the minority and female communities, or have relied upon personal contacts and friendships which have had the effect of excluding from consideration women and minority group persons.

In the academic area, the informality of word-of-mouth recruiting and its reliance on factors outside the knowledge or control of the university makes this method particularly susceptible to abuse. In addition, since women and minorities are often not in word-of-mouth channels of recruitment, their candidacies may not be advanced with the same frequency or strength of endorsement as they merit, and as their white male colleagues receive.

The university contractor must examine the recruitment activities and policies of each unit responsible for recruiting. Where such an examination reveals a significantly lower representation of women or minorities in the university's applicant pool than would reasonably be expected from their availability in the work force, the contractor must modify or supplement its recruiting policies by vigorous and systematic efforts to locate and encourage the candidacy of qualified women and minorities. Where policies have the effect of excluding qualified women or minorities, and where their effects cannot be mitigated by the implementation of additional policies, such policies must be eliminated.

An expanded search network should include not only the traditional avenues through which promising candidates have been located (e.g., in the case of academic appointments, direct letters to graduate departments, or in the case of nonacademic appointments, advertising in community newspapers). In addition, to the extent that it is necessary to overcome underutilization, the university should search in areas and channels previously unexplored.

Certain organizations such as those mentioned in Revised Order No. 4 may be prepared to refer women and minority applicants. For faculty and administrative appointments, disciplinary and professional associations, including committees and caucus groups, should be contacted and their facilities for employee location and referral used.

Particularly in the case of academic personnel, potentially fruitful channels of recruitment include the following:

a. advertisements in appropriate professional journals and job registries;

b. unsolicited applications or inquiries;

c. women teaching at predominantly women's colleges, minorities teaching at predominantly minority colleges;

d. minorities or women professionally engaged in nonacademic positions, such as industry, government, law firms, hospitals;

e. professional women and minorities working at independent research institutions and libraries;

f. professional minorities and women who have received significant grants or professional recognition;

g. women and minorities already at the institution and elsewhere working in research or other capacities not on the academic ladder;

h. minority and women doctoral recipients, from the contractor's own institution and from other institutions, who are not presently using their professional training;

i. women and minorities presently candidates for graduate degrees at the institution and elsewhere who show promise of outstanding achievement (some institutions have developed programs of support for completion of doctoral programs with a related possibility of future appointment);

j. minorities and women listed in relevant professional files, registries and data banks, including those which have made a particularly conscientious effort to locate women and minority persons.

It should be noted that a contractor is required to make explicit its commitment to equal employment opportunity in all recruiting announcements or advertisements. It may do this by indicating that it is an ''equal opportunity employer.'' It is a violation of the Executive Order, however, for a prospective employer to state that only members of a particular minority group or sex will be considered.

Where search committees are used to locate candidates for appointment, they can best carry out the above measures when they are composed of persons willing and able to explore new avenues of recruitment. Effective search committees should, if possible, include among their members women and minority persons.

Policies which exclude recruitment at predominantly minority colleges and universities restrict the pool of qualified minority faculty from which prospective appointees may be chosen. Even if the intent of such policies may be to prevent the so-called ''raiding'' of minority faculty by predominantly white institutions, such policies violate the nondiscrimination provision of the Executive Order since their effect is to deny opportunity for employment on grounds relating to race. Such policies have operated to the serious disadvantage of students and teachers at minority institutions by denying them notice of research and teaching opportunities, assistantships, endowed professorships and many other programs which might enhance their potential for advancement, whether they choose to stay at a predominantly minority institution or move to a non-minority institution.

Minorities and women are frequently recruited only for positions thought to be for minorities and women, such as equal employment programs, ethnic studies, or women's studies. While these positions may have a particular suitability for minority persons and women, institutions must not restrict consideration of women and minorities to such areas, but should actively recruit them for any position for which they may be qualified.

Hiring

Once a nondiscriminatory applicant pool has been established through recruitment, the process of selection from that pool must also carefully follow procedures designed to ensure nondiscrimination. In all cases, standards and criteria for employment should be made reasonably explicit, and should be accessible to all employees and applicants. Such standards may not overtly draw a distinction based on race, sex, color, religion, or national origin, nor may they be applied inconsistently to deny equality of opportunity on these bases.

In hiring decisions, assignment to a particular title or rank may be discriminatory. For example, in many institutions women are more often assigned initially to lower academic ranks than are men. A study by one disciplinary association showed that women tend to be offered a first appointment at the rank of Instructor rather than the rank of Assistant Professor three times more often than men with identical qualifications. Where there is no valid basis for such differential treatment, such a practice is in violation of the Executive Order.

Recruiting and hiring decisions which are governed by unverified assumptions about a particular individual's willingness or ability to relocate because of his or her race or sex are in violation of the Executive Order. For example, university personnel responsible for employment decisions should not assume that a woman will be unwilling to accept an offer because of her marital status, or that a minority person will be unwilling to live in a predominantly white community.

Institutional policies regarding the employment of an institution's own graduates must not be applied in any manner which would deny opportunities to women and minorities. A university must give equal consideration to its graduate students regardless of their race or sex for future faculty positions, if the institution employs its own graduates.

In the area of academic appointments, a nondiscriminatory selection process does not mean that an institution should indulge in ''reverse discrimination'' or ''preferential treatment'' which leads to the selection of unqualified persons over qualified ones. Indeed, to take such action on grounds of race, ethnicity, sex or religion constitutes discrimination in violation of the Executive Order.

It should also be pointed out that nothing in the Executive Order requires or permits a contractor to fire, demote or displace persons on grounds of race, color, sex, religion, or national origin in order to fulfill the affirmative action concept of the Executive Order. Again, to do so would violate the Executive Order. Affirmative action goals are to be sought through recruitment and hiring for vacancies created by normal growth and attrition in existing positions.

Unfortunately, a number of university officials have chosen to explain dismissals, transfers, alterations of job descriptions, changes in promotion potential or fringe benefits, and refusals to hire not on the basis of merit or some objective sought by the university administration aside from the Executive Order, but on grounds that such actions and other ''preferential treatment regardless of merit'' are now required by Federal law. Such statements constitute either a misunderstanding of the law or a willful distortion of it. In either case, where they actually reflect decisions not to employ or promote on grounds of race, color, sex, religion or national origin, they constitute a violation of the Executive Order and other Federal laws.

Anti-nepotism Policies

Policies or practices which prohibit or limit the simultaneous employment of two members of the same family and which have an adverse impact upon one sex or the other are in violation of the Executive Order. For example, because men have traditionally been favored in employment over women, anti-nepotism regulations in most cases operate to deny employment opportunity to a wife rather than to a husband.

If an institution's regulations against the simultaneous employment of husband and wife are discriminatory on their face (e.g., applicable to ''faculty wives''), or if they have in practice served in most instances to deny a wife rather than a husband employment or promotion opportunity, salary increases, or other employment benefits, they should be altered or abolished in order to mitigate their discriminatory impact.

Stated or implied presumptions against the consideration of more than one member of the same family for employment by the same institution or within the same academic department also tends to limit the opportunities available to women more than to men.

If an individual has been denied opportunity for employment, advancement or benefits on the basis of an anti-nepotism rule or practice, that action is discriminatory and is prohibited under the Executive Order. Institutional regulations which set reasonable restrictions on an individual's capacity to function as judge or advocate in specific situations involving a member of his or her immediate family are permissible where they do not have the effect of denying equal employment opportunity to one sex over the other.*

Placement, Job Classification, and Assignment

A contractor must examine carefully its job category assignments and treatment of individuals within a single job classification. Experience shows that individuals of one sex or race frequently tend to be ''clustered'' in certain job classifications, or in certain departments or divisions within an institution. Most often those classifications or departments in which women or minorities are found tend to be lower paid, and have less opportunity for advancement than those to which non-minority males are assigned.

Where there are no valid or substantial differences in duties or qualifications between different job classifications, and where persons in the classifications are segregated by race, color, religion, sex, or national origin, those separate classifications must be eliminated or merged. For example, where male administrative aides and female administrative assistants are performing the same duties and bear the same responsibilities, but are accorded different salaries and advancement opportunities, and where the separate classifications upon examination yield no valid distinctions, the separate classifications must be eliminated or merged.

In academic employment, minorities and women have sometimes been classified as ''research associates,'' ''lecturers'' or similar categories of employment which do not carry with them the benefits and protections of regular academic appointment, and from which promotion is rare, while men with the same qualifications are appointed to regular faculty positions. Such sex- or minority-segregated classification is discriminatory and must be eliminated. In addition, appropriate remedies must be afforded those persons previously assigned to such classifications.

Training

To eliminate discrimination and assure equal opportunity in promotion, an employer should initiate necessary remedial, job training and work study programs aimed at upgrading specific skills. This is generally applicable in the case of nonacademic employees, but may also be relevant in the case of academic employees as, for example, in providing opportunities to participate in research projects, or to gain new professional skills through leave policies or special programs offered by the institution.

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*For an indication of what should constitute ''reasonable restriction,'' see the policy statement of the American Association of University Professors on ''Faculty Appointment and Family Relationship,'' which suggests that ''faculty members should neither initiate or participate in institutional decisions involving a direct benefit (initial appointment, retention, promotion, salary, leave of absence, etc.) to members of their immediate families.''

In institutions where in-service training programs are one of the ladders to administrative positions, minorities and women must be admitted into these programs on an equal basis with non-minority men. Furthermore, opportunities for training may not be limited to positions which are occupied by non-minorities and males.

The employment of students by an institution is subject to the same considerations of nondiscrimination and affirmative action as is all other employment in an institution.

Promotion

A contractor's policies and practices on promotion should be made reasonably explicit, and administered to ensure that women and minorities are not at a disadvantage. A contractor is also obligated to make special efforts to ensure that women and minorities in its work force are given equal opportunity for promotion. Specifically, 41 CFR 60-2.24 states that this result may be achieved through remedial, work study and job training programs; through career counseling programs; through the posting and announcement of promotion opportunities; and by the validation of all criteria for promotion.

Termination

Where action to terminate has a disproportionate effect upon women or minorities and the employer is unable to demonstrate reasons for the decision to terminate unrelated to race, religion, color, national origin or sex, such actions are discriminatory. Seniority is an acceptable standard for termination, with one exception: where an incumbent has been found to have been the victim of discrimination and as a result has less actual seniority than he or she would have had but for such discrimination, either seniority cannot be used as the primary basis for termination, or the incumbent must be presumed to have the seniority which he or she would have had in the absence of discrimination.

Conditions of Work

A university employer must ensure nondiscrimination in all terms and conditions of employment, including work assignments, educational and training opportunities, research opportunities, use of facilities, and opportunities to serve on committees or decision-making bodies.

Intentional policy or practice which subjects persons of a particular sex or minority status to heavier teaching loads, less desirable class assignments, and fewer opportunities to serve on key decision-making bodies or to apply for research grants or leaves of absence for professional purposes, is in violation of the Executive Order.

Similarly, institutional facilities such as dining halls or faculty clubs have sometimes restricted their services to men only. Where such services are a part of the ordinary benefits of employment for certain classifications of employees, no members of such classifications can be denied them on the basis of race, color, national origin, sex, or religion.

Rights and Benefits-Salary

The Executive Order requires that universities adhere carefully to the concept of equal pay for equal work.

In many situations persons who hold the same or equivalent positions, with the same or equivalent qualifications, are not paid similar salaries, and disparities are identifiable along lines of race, color, national origin, sex, or religion.

An institution should set forth with reasonable particularity criteria for determining salary for each job classification and within each job classification. These criteria should be made available to all present and potential employees.

The question is often raised as to whether a person who applies for a position within a given job classification may be given a higher or lower rate of pay at entry based upon his or her pay in another position, or upon market factors defined outside the context of the institution's determination of rates of pay. Where reference to external market factors results in a disparate effect upon women or minority group persons, a reference to those rates of pay is prohibited. For example, if a minority or female applicant applies for a position as an Assistant Professor, and the salary range of those entering that position is from $10,000 to $12,000, the fact that the applicant's former position paid only $8,000 cannot be used to deny him or her the minimum pay for the new position, when non-minority men in a comparable situation are given an entry salary at or above the minimum stipulated area. In this example, the applicant's level of pay must be determined on the basis of capability and record of performance, not former salary.

Back Pay

Back pay awards are authorized and widely used as a remedy under Title VII of the Civil Rights Act of 1964, the Equal Pay Act, and the National Labor Relations Act. Universities, like other employers, are subject to the provisions of these statutes.

This means that evidence of discrimination that would require back pay as a remedy will be referred to the appropriate Federal enforcement agency if the Office for Civil Rights is not able to negotiate a voluntary settlement with a university. At the direction of the Department of Labor, the Office for Civil Rights will continue to pursue back pay settlements only in cases involving employees who, while protected by the Executive Order, were not protected by the three statutes mentioned above at the time violation occurred.

Contractors continue to have the prospective obligation to include in an affirmative action program whatever payments are necessary to remove existing differentials in pay (based on race or sex) identified in the analyses required under the Executive Order.

Leave Policies

A university contractor must not discriminate against employees in its leave policies, including paid and unpaid leave for educational or professional purposes, sick leave, annual leave, temporary disability, and leave for purposes of personal necessity.

Employment Policies Relating to Pregnancy and Childbirth

41 CFR 60-20 (Sex Discrimination Guidelines) (Tab D) provides that ''women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing.'' Pregnancy and childbearing must be considered as a justification of a leave of absence for a female employee regardless of marital status, for a reasonable length of time, and for reinstatement following childbirth without loss of seniority or accrued benefits.

A. Eligibility: If an employer has a policy on eligibility for leave, a female employee may not be required to serve longer than the minimum length of service required for other types of leave in order to qualify for maternity leave. If the employer has no leave policy, childbearing must nevertheless be considered as a justification for a leave of absence for a female employee for a reasonable length of time.

B. Mandatory period of leave: Any policy requiring a mandatory leave of absence violates the Executive Order unless it is based on individual medical or job characteristics. In such cases the employer must clearly demonstrate an overriding need based on medical safety or ''business necessity,'' i.e., that the successful performance of the position or job in question requires the leave. For example, service in a radiation laboratory may constitute a demonstrable hazard to the expectant mother or her child. A mandatory period of leave should not, however, be stipulated by the university; the length of leave, whether mandatory or voluntary, should be based on a bona fide medical need related to pregnancy or childbirth.

C. Eligibility for and conditions of return: Following the end of leave warranted by childbirth, a female employee must be offered reinstatement to her original position or one of like status and pay without loss of seniority or accrued benefits.

D. Other conditions of leave: Department of Labor guidelines provide that the conditions related to pregnancy leave, i.e., salary, accrual of seniority and other benefits, reinstatement rights, etc., must be in accordance with the employer's general leave policy.

On April 5, 1972, the Equal Employment Opportunity Commission, under Title VII of the Civil Rights Act of 1964, issued revised guidelines on sex discrimination, 37 Fed. Reg. 6835, which differ substantially from the present Department of Labor guidelines under the Executive Order. The Labor Department has not adopted the rules of the EEOC as its own, although universities are subject to them. However, serious consideration is now being given to revising the Labor Department guidelines to equate disabilities caused by pregnancy and childbirth with all other temporary disabilities for which an employer might provide leave time, insurance pay, and other benefits.

E. Child care leave: If employees are generally granted leave for personal reasons, such as for a year or more, leave for purposes relating to child care should be considered grounds for such leave, and should be available to men and women on an equal basis. A faculty member should not be required to have such leave time counted toward the completion of a term as a probationary faculty member, unless personal leave for other reasons is so considered. Nor should such leave time be subtracted from a stated term of appointment, or serve as a basis for nonrenewal of contract.

Fringe Benefits

Fringe benefits are defined to include medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave, and other terms and conditions of employment.

The university should carefully examine its fringe benefit programs for possible discriminatory effects. For example, it is unlawful for an employer to establish a retirement or pension plan which establishes different optional or mandatory retirement ages for men and for women.

Where an employer conditions benefits available to employees and their spouses and families on whether the employee is the ''head of the household'' or ''principal wage-earner'' in the family unit, such benefits cannot be made available only to male employees and their families. The employer also must not presume that a married man is the ''head of the household'' or ''principal wage earner''; this is a matter which must be determined by the employee and his or her family.

It is also unlawful for an employer to make benefits available to the wives and families of male employees where the same benefits are not available to the husbands and families of female employees.

With regard to retirement benefits and insurance, pensions, and other welfare programs, Department of Labor Sex Discrimination Guidelines provide that benefits must be equal for both sexes, or that the employer's contribution must be equal for both sexes. This means that a different rate of retirement benefits for men and women does not violate the Executive Order if the employer's contributions for both sexes are equal. It is not a violation of the Executive Order if the employer, in seeking to equalize benefits for men and women employees, contributes more for one sex than the other.*

Child Care

41 CFR 60-2.24 states that an employer should, as part of his affirmative action program, encourage child care programs appropriately designed to improve the employment opportunities of minorities and women. An increasing number of institutions have established child care programs for their male and female employees and students, and we commend such efforts to all institutions. As part of an affirmative action program, such programs may improve the employment opportunities of all employees, not only women and minorities, and contribute significantly to an institution's affirmative action profile.

Grievance Procedures

As of March 1972 and pursuant to the provisions of the Equal Employment Opportunity Act of 1972, the Equal Employment Opportunity Commission has jurisdiction over individual complaints of discrimination by academic as well as non-academic employees of educational institutions.

Pursuant to formal agreement between OCR and EEOC, and to avoid duplication of effort, individual complaints of discrimination will be investigated and remedied by EEOC. Class complaints, groups of individual complaints or other information which indicates possible institutional patterns of discrimination (as opposed to isolated cases) will remain subject to investigation by OCR. In such cases, retrospective relief for individuals within such classes or groups will remain within the jurisdiction of EEOC.

Where an employer has established sound standards of due process for the hearing of employee grievances, and has undertaken a prompt and good faith effort to identify and provide relief for grievances, a duplicative assumption of jurisdiction by the Federal Government has not always proven necessary. We therefore urge the development of sound grievance procedures for all employees, academic and nonacademic alike, in order to ensure the fair treatment of individual cases where discrimination is alleged, and to maintain the integrity of the employer's internal employment system.

Institutional grievance procedures which provide for prompt and equitable hearing of employee grievances relating to employment discrimination should be written and available to all present and prospective employees.

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*Benefits which are different for men and women have been declared in violation of Title VII of the Civil Rights Act of 1964 in recent guidelines published by the Equal Employment Opportunity Commission. These guidelines also state that it is no defense against a charge of sex discrimination that the cost of such benefits is greater for one sex than for the other.

III. DEVELOPMENT OF AFFIRMATIVE ACTION PROGRAMS

Effective affirmative action programs shall contain, but not necessarily be limited to, the following ingredients:

1. Development or reaffirmation of the contractor's equal employment opportunity policy: Each institution should have a clear written statement over the signature of the chief administrative officer which sets forth the institution's legal obligation and policy for the guidance of all supervisory personnel, both academic and nonacademic, for all employees and for the community served by the institution. The policy statement should reflect the institution's affirmative commitment to equal employment opportunity, as well as its commitment to eliminate discrimination in employment on the basis of race, color, sex, religion and national origin.

2. Dissemination of the policy: Internal communication of the institution's policy in writing to all supervisory personnel is essential to their understanding, cooperation and compliance. All persons responsible for personnel decisions must know what the law requires, what the institution's policy is, and how to interpret the policy and implement the program within the area of their responsibility. Formal and informal external dissemination of the policy is necessary to inform and secure the cooperation of organizations within the community, including civil rights groups, professional associations, women's groups, and various sources of referral within the recruitment area of the institution.

The employer should communicate to all present and prospective employees the existence of the affirmative action program, and make available such elements of the program as will enable them to know of and avail themselves of its benefits.

3. Responsibility for implementation: An administrative procedure must be set up to organize and monitor the affirmative action program. 41 CFR 60-2.22 provides that an executive of the contractor should be appointed as director of EEO programs, and that he or she should be given ''the necessary top management support and staffing to execute the assignment.'' (See the remainder of section 2.22 for details of the responsibilities of the Equal Employment Opportunity Officer.) This should be a person knowledgeable of and sensitive to the problems of women and minority groups. Depending upon the size of the institution, this may be his or her sole responsibility, and necessary authority and staff should be accorded the position to ensure the proper implementation of the program.

In several institutions the EEO officer has been assisted by one or more task forces composed in substantial part of women and minority persons. This has usually facilitated the task of the EEO officer and enhanced the prospects of success for the affirmative action program in the institution.

4. Identification of problem areas by organizational units and job classifications: In this section the contractor should address itself to the issues discussed in sections I and II above. The questions involved in data gathering and analysis are treated in appendix J.

Once an inventory is completed, the data should be coded and controlled in strict confidence so that access is limited to those persons involved in administering and reviewing the Equal Employment Opportunity Program. Some state and local laws may prohibit the collection and retention of data relating to the race, sex, color, religion, or national origin of employees and applicants for employment. Under the principle of Federal supremacy, requirements for such inventories and recordkeeping under the Executive Order supersede any conflicting state or local law, and the existence of such laws is not an acceptable excuse for failure to collect or supply such information as required under the Executive Order.

5. Internal audit and reporting systems: An institution must include in its administrative operation a system of audit and reporting to assist in the implementation and monitoring of the affirmative action program, and in periodic evaluations of its effectiveness. In some cases a reporting system has taken the form of a monitoring of all personnel actions, so that department heads and other supervisors must make periodic reports on affirmative action efforts to a central office. In most cases all new appointments must be accompanied by documentation of an energetic and systematic search for women and minorities.

Reporting and monitoring systems will differ from institution to institution according to the nature of the goals and programs established, but all should be sufficiently organized to provide a ready indication of whether or not the program is succeeding, and particularly whether or not good faith efforts have been made to ensure fair treatment of women and minority group persons before and during employment. Reporting systems should include a method of evaluating applicant flow; referral and hiring rate; and an application retention system to allow the development of an inventory of available skills.

At least once annually the institution must prepare a formal report to OCR on the results of its affirmative action compliance program. The evaluation necessary to prepare such a report will serve as a basis for updating the program, taking into consideration changes in the institution's work force (e.g., expansion, contraction, turnover), changes in the availability of minorities and women through improved educational opportunities, and changes in the comparative availability of women as opposed to men as a result of changing interest levels in different types of work.

6. Publication of affirmative action programs: In accordance with 41 CFR 60-2.21(11), which states that the contractor should ''communicate to his employees the existence of the contractor's affirmative action program and make available such elements of his program as will enable such employees to know of and avail themselves of its

benefits,'' the Office for Civil Rights urges institutions to make public their affirmative action plans. University contractors should also be aware that affirmative action plans accepted by the Office for Civil Rights are subject to disclosure to the public under the Freedom of Information Act, 5 U.S.C. 552. Subject to certain exemptions, disclosure ordinarily will include broad utilization analyses, proposed remedial steps, goals and timetables, policies on recruitment, hiring, promotion, termination, grievance procedures and other affirmative measures to be taken. Other types of documents which must be released by the Government upon a request for disclosure include the contractor's validation studies of tests and other preemployment selection methods.

Exempt from disclosure are those portions of the plan which contain confidential information about employees, the disclosure of which may constitute an invasion of privacy, information in the nature of trade secrets, and confidential commercial or financial information within the meaning of 5 U.S.C. 552(b) (4). Compliance agencies also are not authorized to disclose the Standard Form 100 (EEO-1) or similar reporting forms or information about individuals.

7. Developing a plan: The Office for Civil Rights recognizes that in an institution of higher education, and particularly in the academic staff, responsibility for matters concerning personnel decisions is diffused among many persons at a number of different levels. The success of a university's affirmative action program may be dependent in large part upon the willingness and ability of the faculty to assist in its development and implementation. Therefore, the Office for Civil Rights urges that university administrators involve members of their faculty, as well as other supervisory personnel in their work force, in the process of developing an information base, determining potential employee availability, the establishment of goals and timetables, monitoring and evaluating the effectiveness of the plan, and in all other appropriate elements of a plan. A number of institutions have successfully established faculty or joint faculty-staff commissions or task forces to assist in the preparation and administration of its affirmative action obligations. We therefore recommend to university contractors that particular attention be given the need to bring into the deliberative and decision-making process those within the academic community who have a responsibility in personnel matters.

The Office for Civil Rights stands ready to the fullest extent possible to assist university contractors in meeting their equal employment opportunity obligations.

TAB A

This is the text of Executive Order 11246, signed by President Johnson September 24, 1965, as amended by Executive Order 11375, signed October 13, 1967.

Amended Part I was superseded by Executive Order 11478, signed by President Nixon August 8, 1969.

Part II was amended to add sex as a prohibited basis of discrimination, effective October 13, 1968.

EXECUTIVE ORDER
11246

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

PART I—Nondiscrimination in Government Employment

[Secs. 101-105, barring discrimination in federal employment on account of race, color, religion, sex, or national origin, were superseded by Executive Order 11478. These provisions called for affirmative-action programs for equal opportunity at the agency level under general supervision of the Civil Service Commission; establishment of complaint procedures at each agency with appeal to the Commission; and promulgation of regulations by CSC.]

PART II—Nondiscrimination in Employment by Government Contractors and Subcontractors

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SUBPART A—DUTIES OF THE SECRETARY OF LABOR

Sec. 201. The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

SUBPART B—CONTRACTORS' AGREEMENTS

Sec. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

"(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

"(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

"(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

"(4) The contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

"(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

"(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

"(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided*, however, That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

Sec. 203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

(b) Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any previous contract subject to the provisions of this Order, or any preceding similar executive order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

(c) Whenever the contractor or subcontractor has a collective bargaining agreement or other contract or understanding with a labor union or an agency referring workers or providing or supervising apprenticeship or training for such workers, the Compliance Report shall include such information as to such labor union's or agency's practices and policies affecting compliance as the Secretary of Labor may prescribe: *Provided*, That to the extent such information is within the exclusive possession of a labor union or an agency referring workers or providing or supervising apprenticeship or training and such labor union or agency shall refuse to furnish such information to the contractor, the contractor shall so certify to the contracting agency as part of its Compliance Report and shall set forth what efforts he has made to obtain such information.

(d) The contracting agency or the Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information, to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, religion, sex, or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this Order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the Order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the contracting agency or the Secretary of Labor may require.

Sec. 204. The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order. The Secretary of Labor may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: *Provided,* That such an exemption will not interfere with or impede the effectuation of the purposes of this Order: *And provided further,* That in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

SUBPART C—POWERS AND DUTIES OF THE SECRETARY OF LABOR AND THE CONTRACTING AGENCIES

Sec. 205. Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors. All contracting agencies shall comply with the rules of the Secretary of Labor in discharging their primary responsibility for securing compliance with the provisions of contracts and otherwise with the terms of this Order and of the rules, regulations and orders of the Secretary of Labor issued pursuant to this Order. They are directed to cooperate with the Secretary of Labor and to furnish the Secretary of Labor such information and assistance as he may require in the performance of his functions under this Order. They are further directed to appoint or designate, from among the agency's personnel, compliance officers. It shall be the duty of such officers to seek compliance with the objectives of this Order by conference, conciliation, mediation, or persuasion.

Sec. 206. (a) The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor, or initiate such investigation by the appropriate contracting agency, to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor and the investigating agency shall report to the Secretary of Labor any action taken or recommended.

(b) The Secretary of Labor may receive and investigate or cause to be investigated complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order. If this investigation is conducted for the Secretary of Labor by a contracting agency, that agency shall report to the Secretary what action has been taken or is recommended with regard to such complaints.

Sec. 207. The Secretary of Labor shall use his best efforts, directly and through contracting agencies, other interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 or other provision of Federal law.

Sec. 208. (a) The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

(b) The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection (a) of this Section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 209 (a)(6) shall be made without affording the contractor an opportunity for a hearing.

SUBPART D—SANCTIONS AND PENALTIES

Sec. 209. (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary or the appropriate contracting agency may:

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or the rules, regulations, and orders of the Secretary of Labor.

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964.

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) Cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the nondiscrimination provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

(b) Under rules and regulations prescribed by the Secretary of Labor, each contracting agency shall make reasonable efforts within a reasonable time limitation to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under Subsection (a) (2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under Subsection (a) (5) of this Section for failure of a contractor or subcontractor to comply with the contract provisions of this Order.

Sec. 210. Any contracting agency taking any action authorized by this Subpart, whether on its own motion, or as directed by the Secretary of Labor, or under the rules and regulations of the Secretary, shall promptly notify the Secretary of such action. Whenever the Secretary of Labor makes a determination under this Section, he shall promptly notify the appropriate contracting agency of the action recommended. The agency shall take such action and shall report the results thereof to the Secretary of Labor within such time as the Secretary shall specify.

Sec. 211. If the Secretary shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor or, if the Secretary so authorizes, to the contracting agency.

Sec. 212. Whenever a contracting agency cancels or terminates a contract, or whenever a contractor has been debarred from further Government contracts, under Section 209 (a) (6) because of noncompliance with the contract provisions with regard to nondiscrimination, the Secretary of Labor or the contracting agency involved, shall promptly notify the Comptroller General of the United States. Any such debarment may be rescinded by the Secretary of Labor or by the contracting agency which imposed the sanction.

SUBPART E—CERTIFICATES OF MERIT

Sec. 213. The Secretary of Labor may provide for issuance of a United States Government Certificate of Merit to employers or labor unions, or other agencies which are or may hereafter be engaged in work under Government contracts, if the Secretary is satisfied that the personnel and employment practices of the employer, or that the personnel training, apprenticeship, membership, grievance and representation, upgrading, and other practices and policies of the labor union or other agency conform to the purposes and provisions of this Order.

Sec. 214. Any Certificate of Merit may at any time be suspended or revoked by the Secretary of Labor if the holder thereof, in the judgment of the Secretary, has failed to comply with the provisions of this Order.

Sec. 215. The Secretary of Labor may provide for the exemption of any employer, labor union, or other agency from any reporting requirements imposed under or pursuant to this Order if such employer, labor union, or other agency has been awarded a Certificate of Merit which has not been suspended or revoked.

PART III—Nondiscrimination Provisions in Federally Assisted Construction Contracts

Sec. 301. Each executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction contracts paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 203 of this Order or such modification thereof, preserving in substance the contractor's obligations thereunder, as may be approved by the Secretary of Labor, together with such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations. Each such applicant shall also undertake and agree (1) to assist and cooperate actively with the administering department or agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations, and relevant orders of the Secretary, (2) to obtain and to furnish to the administering department or agency and to the Secretary of Labor such information as they may require for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor or the administering department or agency pursuant to Part II, Subpart D, of this Order, and (4) to refrain from entering into any contract subject to this Order, or extension or other modification of such a contract with a contractor debarred from Government contracts under Part II, Subpart D, of this Order.

Sec. 302. (a) "Construction contract" as used in this Order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

(b) The provisions of Part II of this Order shall apply to such construction contracts, and for purposes of such application the administering department or agency shall be considered the contracting agency referred to therein.

(c) The term "applicant" as used in this Order means an applicant for Federal assistance or, as determined by agency regulation, other program participant, with respect to whom an application for any grant, contract, loan, insurance, or guarantee is not finally acted upon prior to the effective date of this Part, and it includes such an applicant after he becomes a recipient of such Federal assistance.

Sec. 303 (a) Each administering department and agency shall be responsible for obtaining the compliance of such applicants with their undertakings under this Order. Each administering department and agency is directed to cooperate with the Secretary of Labor, and to furnish the Secretary such information and assistance as he may require in the performance of his functions under this Order.

(b) In the event an applicant fails and refuses to comply with his undertakings, the administering department or agency may take any or all of the following actions: (1) cancel, terminate, or suspend in whole or in part the agreement, contract, or other arrangement with such applicant with respect to which the failure and refusal occurred; (2) refrain from extending any further assistance to the applicant under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received from such applicant; and (3) refer the case to the Department of Justice for appropriate legal proceedings.

(c) Any action with respect to an applicant pursuant to Subsection (b) shall be taken in conformity with Section 602 of the Civil Rights Act of 1964 (and the regulations of the administering department or agency issued thereunder), to the extent applicable. In no case shall action be taken with respect to an applicant pursuant to Clause (1) or (2) of Subsection (b) without notice and opportunity for hearing before the administering department or agency.

Sec. 304. Any executive department or agency which imposes by rule, regulation, or order requirements of non-discrimination in employment, other than requirements imposed pursuant to this Order, may delegate to the Secretary of Labor by agreement such responsibilities with respect to compliance standards, reports, and procedures as would tend to bring the administration of such requirements into conformity with the administration of requirements imposed under this Order: *Provided*, That actions to effect compliance by recipients of Federal financial assistance with requirements imposed pursuant to Title VI of the Civil Rights Act of 1964 shall be taken in conformity with the procedures and limitations prescribed in Section 602 thereof and the regulations of the administering department or agency issued thereunder.

PART IV—Miscellaneous

Sec. 401. The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the Government, any function or duty of the Secretary under Parts II and III of this Order, except authority to promulgate rules and regulations of a general nature.

Sec. 402. The Secretary of Labor shall provide administrative support for the execution of the program known as the "Plans for Progress."

Sec. 403. (a) Executive Orders Nos. 10590 (January 18, 1955), 10722 (August 5, 1957), 10925 (March 6, 1961), 11114 (June 22, 1963), and 11162 (July 28, 1964) are hereby superseded and the President's Committee on Equal Employment Opportunity established by Executive Order No. 10925 is hereby abolished. All records and property in the custody of the Committee shall be transferred to the Civil Service Commission and the Secretary of Labor, as appropriate.

(b) Nothing in this Order shall be deemed to relieve any person of any obligation assumed or imposed under or pursuant to any executive order superseded by this Order. All rules, regulations, orders, instructions, designations, and other directives issued by the President's Committee on Equal Employment Opportunity and those issued by the heads of various departments or agencies under or pursuant to any of the executive orders superseded by this Order, shall, to the extent that they are not inconsistent with this Order, remain in full force and effect unless and until revoked or superseded by appropriate authority. References in such directives to provisions of the superseded orders shall be deemed to be references to the comparable provisions of this Order.

Sec. 404. The General Services Administration shall take appropriate action to revise the standard Government contract forms to accord with the provisions of this Order and of the rules and regulations of the Secretary of Labor.

Sec. 405. This Order shall become effective 30 days after the date of this Order.

The Department of Labor is responsible for enforcement of this Executive Order. Contract compliance responsibilities have been assigned to the Department of Health, Education, and Welfare for HEW-assisted construction contractors and for government contractors in the following industries:

Insurance

Insurance Agents

Medical, Legal and Education Services

Museums, Art Galleries

Non-Profit Organizations

Certain State and Local Governments

Within the Department of Health, Education, and Welfare, the contract compliance program is administered by

Contract Compliance Division
Office for Civil Rights
Washington, D.C. 20201
(202) 963-5707

(An inquiry concerning insurance companies as government contractors should be directed to the Special Staff for Labor Relations and Equal Employment Opportunity, Social Security Administration, Baltimore, Maryland 21235.)

Requests for additional information regarding the HEW civil rights compliance program may be directed to the Office for Civil Rights in Washington, D. C. or to the Regional Office serving your State.

TAB B

FEDERAL REGISTER

VOLUME 33 • NUMBER 104
Tuesday, May 28, 1968 • Washington, D.C.
PART II

Department of Labor

Office of Federal Contract Compliance

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Obligations of Contractors and Subcontractors

THE NATIONAL ARCHIVES OF THE UNITED STATES
1934

Title 41—PUBLIC CONTRACTS AND PROPERTY MANAGEMENT

Chapter 60—Office of Federal Contract Compliance, Equal Employment Opportunity, Department of Labor

REVISION OF CHAPTER

Chapter 60 of Title 41 of the Code of Federal Regulations was originally issued by the President's Committee on Equal Employment Opportunity for the purpose of implementing Executive Order 10925 (3 CFR, 1959–63 Comp., p. 448) which provided for the promotion and insurance of equal employment opportunity on Government contracts for all persons without regard to race, creed, color, or national origin. Subsequently, the Committee revised this part in order to implement, in addition, Executive Order 11114 (3 CFR, 1959–1963 Comp., p. 774) which provided certain amendments to Executive Order 10925 and extended its requirements to certain contracts for construction financed with assistance from the Federal Government. Parts II and III of Executive Order 11246 (30 F.R. 12319, Sep. 28, 1965) vested in the Secretary of Labor the functions related to Government contracts and Federally assisted construction contracts previously exercised by the President's Committee on Equal Employment Opportunity. Section 201 of Executive Order 11246 provides that the Secretary of Labor shall adopt rules, regulations, and orders as he deems necessary and appropriate to achieve the purposes of the order. Temporary regulations were adopted effective October 24, 1965 (30 F.R. 13441), continuing in effect the previous regulations of the President's Committee on Equal Employment Opportunity, and orders were issued effective June 1, 1966 (31 F.R. 6881), and May 9, 1967 (32 F.R. 7439).

On February 15, 1968, notice of proposed rule making was published in the Federal Register (33 F.R. 3000) which included the substance of the aforesaid orders and other amendments and revisions. Persons interested in the proposals were given until March 15, 1968, to submit written data, views, or argument concerning them.

Having considered all relevant material submitted, I have decided to, and do hereby revise 41 CFR Chapter 60. As revised, 41 CFR Chapter 60 reads as follows:

PART 60–1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

Subpart A—Preliminary Matters; Equal Opportunity Clause; Compliance Reports

Sec.
60–1.1 Purpose and application.
60–1.2 Administrative responsibility.
60–1.3 Definitions.
60–1.4 Equal opportunity clause.
60–1.5 Exemptions.
60–1.6 Duties of agencies.
60–1.7 Reports and other required information.
Sec.
60–1.8 Segregated facilities.
60–1.9 Compliance by labor unions and by recruiting and training agencies.

Subpart B—General Enforcement; Compliance Review and Complaint Procedure

60–1.20 Compliance reviews.
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Authority: The provisions of this Part 60–1 issued pursuant to sec. 201, E.O. 11246 (30 F.R. 12319).

Subpart A—Preliminary Matters; Equal Opportunity Clause; Compliance Reports

§ 60–1.1 Purpose and application.

The purpose of the regulations in this part is to achieve the aims of Parts II, III, and IV of Executive Order 11246 for the promotion and insuring of equal opportunity for all persons, without regard to race, creed, color, or national origin, employed or seeking employment with Government contractors or with contractors performing under federally assisted construction contracts. The regulations in this part apply to all contracting agencies of the Government and to contractors and subcontractors who perform under Government contracts, to the extent set forth in this part. The regulations in this part also apply to all agencies of the Government administering programs involving Federal financial assistance which may include a construction contract, and to all contractors and subcontractors performing under construction contracts which are related to any such programs. The procedures set forth in the regulations in this part govern all disputes relative to a contractor's compliance with his obligations under the equal opportunity clause regardless of whether or not his contract contains a "Disputes" clause. Failure of a contractor or applicant to comply with any provision of the regulations in this part shall be grounds for the imposition of any or all of the sanctions authorized by the order. The regulations in this part do not apply to any action taken to effect compliance with respect to employment practices subject to Title VI of the Civil Rights Act of 1964. The rights and remedies of the Government hereunder are not exclusive and do not affect rights and remedies provided elsewhere by law, regulation, or contract; neither do the regulations limit the exercise by the Secretary or Government agencies of powers not herein specifically set forth, but granted to them by the order.

§ 60–1.2 Administrative responsibility.

Under the general direction of the Secretary, the Director has been delegated authority and assigned responsibility for carrying out the responsibilities assigned to the Secretary under the order, except the power to issue rules and regulations of a general nature. All correspondence regarding the order should be directed to the Director, Office of Federal Contract Compliance, U.S. Department of Labor, 14th and Constitution Avenue NW., Washington, D.C. 20210.

§ 60–1.3 Definitions.

(a) The term "administering agency" means any department, agency and establishment in the Executive Branch of the Government, including any wholly owned Government corporation, which administers a program involving federally assisted construction contracts.

(b) The term "agency" means any contracting or any administering agency of the Government.

(c) The term "applicant" means an applicant for Federal assistance involving a construction contract, or other participant in a program involving a construction contract as determined by regulation of an administering agency. The term also includes such persons after they become recipients of such Federal assistance.

(d) The term "Compliance Agency" means the agency designated by the Director on a geographical industry or other basis to conduct compliance reviews and to undertake such other responsibilities in connection with the administration of the order as the Director may determine to be appropriate. In the absence of such a designation, the Compliance Agency will be determined as follows:

(1) In the case of a prime contractor not involved in construction work, the Compliance Agency will be the agency whose contracts with the prime contractor have the largest aggregate dollar value;

(2) In the case of a subcontractor not involved in construction work, the Compliance Agency will be the Compliance Agency of the prime contractor with which the subcontractor has the largest aggregate value of subcontracts or purchase orders for the performance of work under contracts;

(3) In the case of a prime contractor or subcontractor involved in construction work, the Compliance Agency for each construction project will be the agency providing the largest dollar value for the construction project; and

(4) In the case of a contractor who is both a prime contractor and subcontractor, the Compliance Agency will be determined as if such contractor is a prime contractor only.

(e) The term "construction work" means the construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other onsite functions incidental to the actual construction.

(f) The term "contract" means any Government contract or any federally assisted construction contract.

(g) The term "contracting agency" means any department, agency, establishment, or instrumentality in the Executive Branch of the Government, including any wholly owned Government corporation, which enters into contracts.

(h) The term "contractor" means, unless otherwise indicated, a prime contractor or subcontractor.

(i) The term "Director" means the Director, Office of Federal Contract Compliance, U.S. Department of Labor or any person to whom he delegates authority under the regulations in this part.

(j) The term "equal opportunity clause" means the contract provisions set forth in § 60–1.4 (a) or (b), as appropriate.

(k) The term "federally assisted construction contract" means any agreement or modification thereof between any applicant and a person for construction work which is paid for in whole or in part with funds obtained from the Government or borrowed on the credit of the Government pursuant to any Federal program involving a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, or any application or modification thereof approved by the Government for a grant, contract, loan, insurance, or guarantee under which the applicant itself participates in the construction work.

(l) The term "Government" means the Government of the United States of America.

(m) The term "Government contract" means any agreement or modification thereof between any contracting agency and any person for the furnishing of supplies or services or for the use of rail or personal property, including lease arrangements. The term "services", as used in this section includes, but is not used in this definition includes, but is not limited to the following services: Utility, construction, transportation, research, insurance, and fund depositary. The term "Government contract" does not include (1) agreements in which the parties stand in the relationship of employer and employee, and (2) federally assisted construction contracts.

(n) The term "hearing officer" means the individual or board of individuals designated to conduct hearings.

(o) The term "modification" means any alteration in the terms and conditions of a contract, including supplemental agreements, amendments, and extensions.

(p) The term "Order" means Parts II, III, and IV of the Executive Order 11246 dated September 24, 1965 (30 F.R. 12319), any Executive order amending such order, and any other Executive order superseding such order.

(q) The term "person" means any natural person, corporation, partnership, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

(r) The term "prime contractor" means any person holding a contract and, for the purposes of Subpart B of this part, any person who has held a contract subject to the order.

(s) The term "recruiting and training agency" means any person who refers workers to any contractor or subcontractor, or who provides or supervises apprenticeship or training for employment by any contractor or subcontractor.

(t) The term "rules, regulations, and relevant orders of the Secretary of Labor" used in paragraph (4) of the equal opportunity clause means rules, regulations, and relevant orders of the Secretary of Labor or his designee issued pursuant to the order.

(u) The term "Secretary" means the Secretary of Labor, U.S. Department of Labor.

(v) The term "site of construction" means the general physical location of any building, highway, or other change or improvement to real property which is undergoing construction, rehabilitation, alteration, conversion, extension, demolition, or repair and any temporary location or facility at which a contractor, subcontractor, or other participating party meets a demand or performs a function relating to the contract or subcontract.

(w) The term "subcontract" means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the furnishing of supplies or services or for the use of real or personal property, including lease arrangements, which, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed.

(x) The term "subcontractor" means any person holding a subcontract and, for the purposes of Subpart B of this part, any person who has held a subcontract subject to the order. The term "First-tier subcontractor" refers to a subcontractor holding a subcontract with a prime contractor.

(y) The term "United States" as used herein shall include the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Panama Canal Zone, and the possessions of the United States.

§ 60–1.4 Equal opportunity clause.

(a) *Government contracts.* Except as otherwise provided, each contracting agency shall include the following equal opportunity clause contained in section 202 of the order in each of its Government contracts (and modifications thereof if not included in the original contract):

> During the performance of this contract, the contractor agrees as follows:
>
> (1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.
>
> (2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.
>
> (3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
>
> (4) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.
>
> (5) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
>
> (6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.
>
> (7) The contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: *Provided, however,* That in the event the contractor becomes involved in, or is threatened

with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

(b) *Federally assisted construction contracts.* Except as otherwise provided, each administering agency shall require the inclusion of the following language as a condition of any grant, contract, loan, insurance, or guarantee involving federally assisted construction which is not exempt from the requirements of the equal opportunity clause:

The applicant hereby agrees that it will incorporate or cause to be incorporated into any contract for construction work, or modification thereof, as defined in the regulations of the Secretary of Labor at 41 CFR Chapter 60, which is paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the following equal opportunity clause:

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: *Provided, however,* That in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

The applicant further agrees that it will be bound by the above equal opportunity clause with respect to its own employment practices when it participates in federally assisted construction work: *Provided,* That if the applicant so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

The applicant agrees that it will assist and cooperate actively with the administering agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor, that it will furnish the administering agency and the Secretary of Labor such information as they may require for the supervision of such compliance, and that it will otherwise assist the administering agency in the discharge of the agency's primary responsibility for securing compliance.

The applicant further agrees that it will refrain from entering into any contract or contract modification subject to Executive Order 11246 of September 24, 1965, with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to the Executive order and will carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by the administering agency or the Secretary of Labor pursuant to Part II, Subpart D of the Executive order. In addition, the applicant agrees that if it fails or refuses to comply with these undertakings, the administering agency may take any or all of the following actions: Cancel, terminate, or suspend in whole or in part this grant (contract, loan, insurance, guarantee); refrain from extending any further assistance to the applicant under the program with respect to which the failure or refund occurred until satisfactory assurance of future compliance has been received from such applicant; and refer the case to the Department of Justice for appropriate legal proceedings.

(c) *Subcontracts.* Each nonexempt prime contractor or subcontractor shall include the equal opportunity clause in each of its nonexempt subcontracts.

(d) *Incorporation by reference.* The equal opportunity clause may be incorporated by reference in Government bills of lading, transportation requests, contracts for deposit of Government funds, contracts for issuing and paying U.S. savings bonds and notes, contracts and subcontracts less than $50,000 and such other contracts as the Director may designate.

(e) *Incorporation by operation of the order and agency regulations.* By operation of the order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contracts. The clause may also be applied by agency regulations to every nonexempt contract where there is no written contract between the agency and the contractor.

(f) *Adaptation of language.* Such necessary changes in language may be made in the equal opportunity clause as shall be appropriate to identify properly the parties and their undertakings.

§ 60-1.5 Exemptions.

(a) *General*—(1) *Transactions of $10,000 or under.* Contracts and subcontracts not exceeding $10,000, other than Government bills of lading, are exempt from the requirements of the equal opportunity clause. In determining the applicability of this exemption to any federally assisted construction contract, or subcontract thereunder, the amount of such contract or subcontract rather than the amount of the Federal financial assistance shall govern. No agency, contractor, or subcontractor shall procure supplies or services in less than usual quantities to avoid applicability of the equal opportunity clause.

(2) *Contracts and subcontracts for indefinite quantities.* With respect to contracts and subcontracts for indefinite quantities (including, but not limited to, open end contracts, requirement-type contracts, Federal Supply Schedule contracts, "call-type" contracts, and purchase notice agreements), the equal opportunity clause shall be included unless the purchaser has reason to believe that the amount to be ordered in any year under such contract will not exceed $10,000. The applicability of the equal opportunity clause shall be determined by the purchaser at the time of award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the equal opportunity clause shall be applied to such contract whenever the amount of a single order exceeds $10,000. Once the equal opportunity clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

(3) *Work outside the United States.* Contracts and subcontracts are exempt from the requirements of the equal opportunity clause with regard to work performed outside the United States by

employees who were not recruited within the United States.

(4) *Contracts with State or local governments.* The requirements of the equal opportunity clause in any contract or subcontract with a State or local government (or any agency, instrumentality or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract or subcontract. In addition, State and local governments are exempt from the requirements of filling the annual compliance report provided for by § 60-1.7(a)(1) and maintaining a written affirmative action compliance program prescribed by § 60-1.40.

(b) *Specific contracts and facilities*—(1) *Specific contracts.* The Director may exempt an agency or any person from requiring the inclusion of any or all of the equal opportunity clause in any specific contract or subcontract when he deems that special circumstances in the national interest so require. The Director may also exempt groups or categories of contracts or subcontracts of the same type where he finds it impracticable to act upon each request individually or where group exemptions will contribute to convenience in the administration of the order.

(2) *Facilities not connected with contracts.* The Director may exempt from the requirements of the equal opportunity clause any of a prime contractor's or subcontractor's facilities which he finds to be in all respects separate and distinct from activities of the prime contractor or subcontractor related to the performance of the contract or subcontract, provided that he also finds that such an exemption will not interfere with or impede the effectuation of the order.

(c) *National security.* Any requirement set forth in these regulations in this part shall not apply to any contract or subcontract whenever the head of an agency determines that such contract or subcontract is essential to the national security and that its award without complying with such requirement is necessary to the national security. Upon making such a determination, the head of the agency will notify the Director in writing within 30 days.

(d) *Withdrawal of exemption.* When any contract or subcontract is of a class exempted under this section, the Director may withdraw the exemption for a specific contract or subcontract or group of contracts or subcontracts when in his judgment such action is necessary or appropriate to achieve the purposes of the order. Such withdrawal shall not apply to contracts or subcontracts awarded prior to the withdrawal, except that in procurements entered into by formal advertising, or the various forms of restricted formal advertising, such withdrawal shall not apply unless the withdrawal is made more than 10 calendar days before the date set for the opening of the bids.

§ 60-1.6 Duties of agencies.

(a) *General responsibility.* Each agency shall be primarily responsible for obtaining compliance with the equal opportunity clause, the order, the regulations in this part, and orders issued pursuant thereto. Each agency shall cooperate with the Director and shall furnish him such information and assistance as he may require in the performance of his functions under the order. Such information shall include compliance review reports, schedules of compliance reviews and any other information relevant to the administration of the order.

(b) *Agency program.* The head of each agency shall, subject to the prior approval of the Director, establish a program and promulgate procedures to carry out the agency's responsibilities for obtaining compliance with the order and regulations and orders issued pursuant thereto. Each agency head shall also designate a Contract Compliance Officer, who (unless otherwise approved by the Director) shall be appointed by the head of the agency from among the agency's executive personnel to whom the Executive Schedule applies, and such officer shall be subject to the immediate supervision of the head of the agency. All compliance reviews required pursuant to the regulations in this part and such other compliance reviews as the Contract Compliance Officer determines to be appropriate shall be conducted by him or his designee. The head of the agency or the Contract Compliance Officer may also designate a Deputy Contract Compliance Officer to assist the Contract Compliance Officer in the performance of his duties. The names of the Contract Compliance Officers and the Deputy Contract Compliance Officers, their addresses and telephone numbers, and any changes made in their designation shall be furnished to the Director.

(c) *Agency regulations.* The head of each agency shall prescribe regulations for the administration of the order and the regulations in this part. Agency regulations, directives and orders for such purpose must be submitted to the Director prior to issuance and may be enforced upon approval of the Director or 60 days after submission if not disapproved by the Director.

(d) *Award of contracts.* Sixty days after the effective date of the regulations in this part, each agency shall follow the procedures described below before the award of any nonexempt contract unless agency regulations providing alternative procedures have been issued or are under review by the Director in accordance with paragraph (c) of this section. Such alternative procedures may include monetary cutoffs and other limitations consistent with the agency resources and contracting processes.

(1) All Contracting Officers and officers approving applications for Federal financial assistance involving a construction contract shall notify the Contract Compliance Officer or appropriate Deputy as soon as practicable of the impending award of each nonexempt contract, the name and address of the prime contractor, anticipated time of performance, name and address of each known subcontractor, whether the prime contractor and known subcontractors have previously held any Government contracts or federally assisted construction contracts subject to Executive Order 10925, 11114, or 11246, and whether the prime contractor has previously filed compliance reports required by Executive Order 10925, 11114, or 11246, or by regulations of the Equal Employment Opportunity Commission issued pursuant to Title VII of the Civil Rights Act of 1964.

(2) The Contract Compliance Officer or appropriate Deputy shall review the available information relative to the prospective prime contractor's equal opportunity compliance status and notify the Contracting Officer or Approving Officer of any deficiencies found to exist. A copy of such report shall be forwarded to the Director.

(3) Contracting Officers or Approving Officers shall: (i) Notify the bidder, offeror, or applicant of any deficiencies found to exist by the Contract Compliance Officer or appropriate Deputy, and (ii) direct any bidder, offeror or applicant so notified to negotiate with the Contract Compliance Officer and to take such actions as the Contract Compliance Officer may require.

(4) The award of any such contract shall be conditioned upon the Contract Compliance Officer's notification to the Contracting Officer or Approving Officer that the bidder, offeror or applicant has taken action or has agreed to take action satisfactory to the Contract Compliance Officer, appropriate Deputy, or the head of the agency as provided in § 60-1.20(b) Any such agreement to take action shall be stated in the contract, if the Contract Compliance Officer so requires.

(e) *Evaluations.* The Director may from time to time evaluate the programs, procedures, and policies of agencies in order to assure their compliance with the order and the regulations in this part and the compliance of prime contractors and subcontractors with the equal opportunity clause.

§ 60-1.7 Reports and other required information.

(a) *Requirements for prime contractors and subcontractors.* (1) Each agency shall require each prime contractor and each prime contractor and subcontractor shall cause its subcontractors to file annually, on or before the 31st day of March, complete and accurate reports on Standard Form 100 (EEO-1) promulgated jointly by the Office of Federal Contract Compliance, the Equal Employment Opportunity Commission and Plans for Progress or such form as may hereafter be promulgated in its place if such prime contractor or subcontractor (i) is not exempt from the provisions of these regulations in accordance with § 60-1.5; (ii) has 50 or more employees; (iii) is a prime contractor or first tier subcontarctor; and (iv) has a contract, subcontract or purchase order amounting to $50,000 or more or serves as a depositary of Government funds in any amount, or is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes:

Provided, That any subcontractor below the first tier which performs construction work at the site of construction shall be required to file such a report if it meets requirements of subdivisions (i), (ii), and (iv) of this subparagraph.

(2) Each person required by § 60–1.7(a)(1) to submit reports shall file such a report with the contracting or administering agency within 30 days after the award to him of a contract or subcontract, unless such person has submitted such a report within 12 months preceding the date of the award. Subsequent reports shall be submitted annually in accordance with § 60–1.7(a)(1), or at such other intervals as the agency or the Director may require. The agency with the approval of the Director may extend the time for filing any report.

(3) The Director, the agency or the applicant, on their own motions, may require a prime contractor to keep employment or other records and to furnish, in the form requested, within reasonable limits, such information as the Director, agency or the applicant deems necessary for the administration of the order.

(4) Failure to file timely, complete and accurate reports as required constitutes noncompliance with the prime contractor's or subcontractor's obligations under the equal opportunity clause and is ground for the imposition by the agency, the Director, an applicant, prime contractor or subcontractor, of any sanctions as authorized by the order and the regulations in this part. Any such failure shall be reported in writing to the Director by the agency as soon as practicable after it occurs.

(b) *Requirements for bidders or prospective contractors*—(1) *Previous reports.* Each agency shall require each bidder or prospective prime contractor and proposed subcontractor, where appropriate, to state in the bid or at the outset of negotiations for the contract whether it has participated in any previous contract or subcontract subject to the equal opportunity clause; and, if so, whether it has filed with the Joint Reporting Committee, the Director, an agency, or the former President's Committee on Equal Employment Opportunity all reports due under the applicable filing requirements. In any case in which a bidder or prospective prime contractor or proposed subcontractor which participated in a previous contract or subcontract subject to Executive Order 10925, 11114, or 11246 has not filed a report due under the applicable filing requirements, no contract or subcontract shall be awarded unless such contractor submits a report covering the delinquent period or such other period specified by the agency or the Director.

(2) *Additional information.* A bidder or prospective prime contractor or proposed subcontractor shall be required to submit such information as the agency or the Director requests prior to the award of the contract or subcontract. When a determination has been made to award the contract or subcontract to a specific contractor, such contractor shall be required, prior to award, or after the award, or both, to furnish such other information as the agency, the applicant, or the Director requests.

(c) *Use of reports.* Reports filed pursuant to this section shall be used only in connection with the administration of the order, the Civil Rights Act of 1964, or in furtherance of the purposes of the order and said Act.

§ 60–1.8 Segregated facilities.

(a) *General.* In order to comply with his obligations under the equal opportunity clause, a prime contractor or subcontractor must ensure that facilities provided for employees are provided in such a manner that segregation on the basis of race, creed, color, or national origin cannot result. He may neither require such segregated use by written or oral policies nor tolerate such use by employee custom. His obligation extends further to ensuring that his employees are not assigned to perform their services at any location, under his control, where the facilities are segregated. This obligation extends to all contracts containing the equal opportunity clause regardless of the amount of the contract. The term "facilities" as used in this section means waiting rooms, work areas, restaurants and other eating areas, time clocks, restrooms, wash rooms, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees.

(b) *Certification by prime contractors and subcontractors.* Prior to the award of any nonexempt Government contract or subcontract or federally assisted construction contract or subcontract, each agency or applicant shall require the prospective prime contractor and each prime contractor and subcontractor shall require each subcontractor to submit a certification, in the form approved by the Director, that the prospective prime contractor or subcontractor does not and will not maintain any facilities he provides for his employees in a segregated manner, or permit his employees to perform their services at any location, under his control, where segregated facilities are maintained; and that he will obtain a similar certification in the form approved by the Director, prior to the award of any nonexempt subcontract.

§ 60–1.9 Compliance by labor unions and by recruiting and training agencies.

(a) Whenever compliance with the equal opportunity clause may necessitate a revision of a collective bargaining agreement, the labor union or unions which are parties to such an agreement shall be given an adequate opportunity to present their views to the Director.

(b) The Director shall use his best efforts, directly and through agencies, contractors, subcontractors, applicants, State and local officials, public and private agencies, and all other available instrumentalities, to cause any labor union, recruiting and training agency or other representative of workers who are or may be engaged in work under contracts and subcontracts to cooperate with, and to comply in the implementation of, the purposes of the order.

(c) In order to effectuate the purposes of paragraph (a) of this section, the Director may hold hearings, public or private, with respect to the practices and policies of any such labor union or recruiting and training agency.

(d) The Director may notify any Federal, State, or local agency of his conclusions and recommendations with respect to any such labor organization or recruiting and training agency which in his judgment has failed to cooperate with himself, agencies, prime contractors, subcontractors, or applicants in carrying out the purposes of the order. The Director also may notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever he has reason to believe that the practices of any such labor organization or agency violates Title VII of the Civil Rights Act of 1964 or other provisions of Federal law.

Subpart B—General Enforcement; Compliance Review and Complaint Procedure

§ 60–1.20 Compliance reviews.

(a) The purpose of a compliance review is to determine if the prime contractor or subcontractor maintains nondiscriminatory hiring and employment practices and is taking affirmative action to ensure that applicants are employed and that employees are placed, trained, upgraded, promoted, and otherwise treated during employment without regard to race, creed, color, or national origin. It shall consist of a comprehensive analysis and evaluation of each aspect of the aforementioned practices, policies, and conditions resulting therefrom. Where necessary, recommendations for appropriate sanctions shall be made.

(b) Where deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion. Before the contractor can be found to be in compliance with the order, it must make a specific commitment, in writing, to correct any such deficiencies. The commitment must include the precise action to be taken and dates for completion. The time period alloted shall be no longer than the minimum period necessary to effect such changes. Upon approval of the Contract Compliance Officer, appropriate Deputy or the agency head of such commitment, the contractor may be considered in compliance, on condition that the commitments are faithfully kept. The contractor shall be notified that making such commitments does not preclude future determinations of noncompliance based on a finding that the commitments are not sufficient to achieve compliance.

(c) The Compliance Agency shall have the primary responsibility for the conduct of compliance reviews. Agencies shall institute programs for the regular conduct of compliance reviews in accordance with the Director's guidelines, and shall also conduct compliance reviews in accordance with any special requests or instructions of the Director. Compliance reviews may also be conducted by the Director. Compliance reviews should be conducted by qualified specialists regularly involved in equal opportunity programs.

(d) Each agency must include in the invitation for bids for each formally advertised supply contract which may result in a bid of $1 million or more, a notice (in the form approved by the Director) to prospective bidders that if their bid is in the amount of $1 million or more, the apparent low responsible bidder and his known first-tier subcontractors with subcontract of $1 million or more will be subject to a compliance review before the award of the contract. Before the award of any formally advertised supply contract of $1 million or more, a pre-award compliance review of the prospective contractor and his known first-tier $1 million subcontractors must be conducted by the Compliance Agency within 6 months prior to the award of the contract. If an agency other than the awarding agency is the Compliance Agency, the awarding agency will notify the Compliance Agency and request appropriate action and finding in accordance with this subsection. Compliance Agencies will provide awarding agencies with written reports of compliance reviews within 30 days following the requests. In order to qualify for the award of a contract, a contractor and such first-tier subcontractors must be found on the basis of such review to be able to comply with the equal opportunity clause or carry out an acceptable program for compliance as provided in paragraph (b) of this section.

§ 60–1.21 Who may file complaints.

Any employee of any contractor or applicant for employment with such contractor may, by himself or by an authorized representative, file in writing a complaint of alleged discrimination in violation of the equal opportunity clause. Such complaint is to be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the agency or the Director upon good cause shown.

§ 60–1.22 Where to file.

Complaints may be filed with the agency or with the Director. Those filed with the Director may be referred to the agency for processing, or they may be processed in accordance with § 60–1.25.

§ 60–1.23 Contents of complaint.

(a) The complaint should include the name, address, and telephone number of the complainant, the name and address of the prime contractor or subcontractor committing the alleged discrimination, a description of the acts considered to be discriminatory, and any other pertinent information which will assist in the investigation and resolution of the complaint. The complaint shall be signed by the complainant or his authorized representative.

(b) Where a complaint contains incomplete information, the agency or the Director shall seek promptly the heeded information from the complainant. In the event such information is not furnished to the agency or the Director within 60 days of the date of such request, the case may be closed.

§ 60–1.24 Processing of matters by agencies.

(a) *Complaints.* Where complaints are filed with the agency, the Contracts Compliance Officer shall transmit a copy of the complaint to the Director within 10 days after the receipt thereof.

(b) *Investigations.* The agency or Compliance Agency shall institute a prompt investigation of each complaint filed with it or referred to it, and shall be responsible for developing a complete case record. A complete case record consists of the name and address of each person interviewed, and a summary of his statement, copies or summaries of pertinent documents, and a narrative summary of the evidence disclosed in the investigation as it relates to each violation revealed. When a complaint is filed against a prime contractor or subcontractor who has contracts involving more than one agency, unless otherwise provided, the Compliance Agency shall conduct the investigation and make such findings and determinations as shall be appropriate for the administration of the order.

(c) *Resolution of matters.* (1) If the complaint investigation by the agency pursuant to paragraph (b) of this section shows no violation of the equal opportunity clause, the agency shall so inform the Director. The Director may review the findings of the agency, and he may request further investigation by the agency or may undertake such investigation as he may deem appropriate.

(2) If any complaint investigation or compliance review indicates a violation of the equal opportunity clause, the matter should be resolved by informal means whenever possible. Such informal means may include the holding of a compliance conference by the agency. Each prime contractor and subcontractor shall be advised that the resolution is subject to review by the Director and may be disapproved if he determines that such resolution is not sufficient to achieve compliance.

(3) Where any complaint investigation or compliance review indicates a violation of the equal opportunity clause and the matter has not been resolved by informal means, the Director or the agency, with the approval of the Director, shall afford the contractor an opportunity for a hearing. If the final decision reached in accordance with the provisions of § 60–1.26 is that a violation of the equal opportunity clause has taken place, the Director, or the agency with the approval of the Director, may cause the cancellation, termination, or suspension of any contract or subcontract, cause a contractor to be debarred from further contracts or subcontracts, or may impose such other sanctions as are authorized by the order.

(4) When a prime contractor or subcontractor, without a hearing, shall have complied with the recommendations or orders of an agency or the Director and believes such recommendations or orders to be erroneous, he shall, upon filing a request therefor within ten days of such compliance, be afforded an opportunity for a hearing and review of the alleged erroneous action by the agency or the Director.

(5) For reasonable cause shown, the Director or an agency head may reconsider or cause to be reconsidered any matter on his own motion or pursuant to a request.

(d) *Reports to the Director.* (1) Within 60 days from receipt of a complaint by the agency, or within such additional time as may be allowed by the Director for good cause shown, the agency or the Compliance Agency shall process the complaint and submit to the Director the case record and a summary report containing the following information:

(i) Name and address of the complainant;

(ii) Brief summary of findings, including a statement as to the agency's conclusions regarding the contractor's compliance or noncompliance with the requirements of the equal opportunity clause;

(iii) A statement of the disposition of the case, including any corrective action taken and any sanctions or penalties imposed or, whenever appropriate, the recommended corrective action and sanctions or penalties.

(2) A written report of every preaward compliance review required by this regulation or otherwise required by the Director, including findings, will be forwarded to the Director within 10 days after the award for a postaward review.

(3) A written report of every other compliance review or any other matter processed by the agency involving an apparent violation of the equal opportunity clause shall be submitted to the Director. Such report shall contain a brief summary of the findings, including a statement of conclusions regarding the contractor's compliance or noncompliance with the requirements of the order, and a statement of the disposition of the case, including any corrective action taken or recommended and any sanctions or penalties imposed or recommended.

§ 60–1.25 Assumption of jurisdiction by or referrals to the Director.

The Director may inquire into the status of any matter pending before an agency or a Compliance Agency, including complaints and matters arising out of reports, reviews, and other investigations. Where he considers it necessary or appropriate to the achievement of the purposes of the order, he may assume jurisdiction over the matter and proceed as provided herein. Whenever the Director assumes jurisdiction over any matter, or an agency refers any matter, he may conduct, or have conducted, such investigations, hold such hearings, make such findings, issue such recommendations and directives, order such sanctions and penalties, and take such other action as may be necessary or appropriate to achieve the purposes of the order. The Director shall promptly notify the agency of any corrective action to be taken or any sanctions to be taken or any sanction to be imposed by the agency. The agency shall take such action, and report the results thereof to the Director within the time specified.

§ 60–1.26 Hearings.

(a) *Informal hearings*—(1) *Purpose.* The Director or any agency head with the approval of the Director may convene such informal hearings as may be deemed appropriate for the purpose of inquiring into the status of compliance by any prime contractor or subcontractor with the terms of the equal opportunity clause.

(2) *Notice.* Contractors and subcontractors shall be advised in writing as to the time and place of the informal hearing and may be directed to bring specific documents and records, or furnish other relevant information concerning their compliance status. When so requested, the prime contractor or subcontractor shall attend and bring requested documents and records, or other requested information.

(3) *Conduct of hearings.* The hearing shall be conducted by hearing officers appointed by the Director or an agency head. Parties to informal hearings may be represented by counsel and shall have a fair opportunity to present any relevant material. Formal rules of evidence will not apply to such proceedings.

(b) *Formal hearings*—(1) *General procedure.* The Director or the agency head, with the approval of the Director, may convene formal hearings pursuant to Subpart B of this part. Such hearings shall be conducted in accordance with procedures prescribed by the Director or the agency head. Reasonable notice of a hearing shall be sent by registered mail, return receipt requested, to the last known address of the prime contractor or subcontractor complained against. Such notice shall contain the time and place of hearing, a statement of the provisions of the order and regulations pursuant to which the hearing is to be held, and a concise statement of the matters pursuant to which the action furnishing the basis of the hearing has been taken or is proposed to be taken. Copies of such notice shall be sent to all agencies. Hearings shall be held before a hearing officer designated by the Director or an agency head. Each party shall have the right to counsel, a fair opportunity to present evidence and argument and to cross-examine. Wherever a formal hearing is based in whole or in part on matters subject to the collective bargaining agreement and compliance may necessitate a revision of such agreement, any labor organization which is a signatory to the agreement shall have the right to participate as a party. Any other person or organization shall be permitted to participate upon a showing that such person or organization has an interest in the proceedings and may contribute materially to the proper disposition thereof. The hearing officer shall make his proposed findings and conclusions upon the basis of the record before him.

(2) *Cancellation, termination, and debarment.* No order for cancellation or termination of existing contracts or subcontracts or for debarment from further contracts or subcontracts pursuant to section 209 of the order shall be made without affording the prime contractor or subcontractor an opportunity for a hearing. When cancellation, termination, or debarment is proposed, the following procedure shall be observed:

(i) *Notice of proposed cancellation or termination.* Whenever the Director, or the head of an agency or his designee upon prior notification to the Director, proposes to cancel or terminate, or cause to be canceled or terminated, in whole or in part, a contract or contracts or to require cancellation or termination of a subcontract or subcontracts, a notice of the proposed action, in writing and signed by the Director or head of the agency or his designee, shall be sent to the last known address of the prime contractor or subcontractor, return receipt requested. A copy of such notice shall be sent to all agencies. The prime contractor or subcontractor shall be given at least 10 days from the receipt of the notice either to comply with the provisions of the contract or subcontract or to mail a request for a hearing to the Director or the agency.

(ii) *Notice of proposed ineligibility.* Whenever the Director, or the head of an agency or his designee, upon prior notification to the Director, proposes to declare a prime contractor or subcontractor ineligible for further contracts or subcontracts under section 209 of the order, a notice of the proposed action, in writing and signed by the Director or head of the agency or his designee, shall be sent to the last known address of the prime contractor or subcontractor, return receipt requested. A copy of such notice shall be sent to all agencies. The prime contractor or subcontractor shall be given at least 10 days from the receipt of such notice in which to mail a request for a hearing to the Director or the agency.

(iii) *Suspension during pendency of hearing.* Whenever the prime contractor or subcontractor requests a hearing in accordance with these provisions, his contracts or subcontracts may be suspended, in the discretion of the Director, during the pendency of the hearing.

(iv) *Hearing request.* If at the end of the 10-day period referred to in subdivision (i) of this subparagraph, no request has been received, the Director or the head of the agency may cancel, suspend or terminate or cause to be canceled, suspended or terminated such contracts or subcontracts. If at the end of the 10-day period referred to in subdivision (ii) of this subparagraph no request has been received, the Director or the head of the agency may enter an order declaring the contractor or subcontractor ineligible for further contracts, subcontracts, or extensions or other modifications of existing contracts, until such contractor or subcontractor shall have satisfied the Director that he has established and will carry out personnel and employment policies and practices in compliance with the provisions of the equal opportunity clause.

(v) *Decision following hearing.* When the hearing is conducted by an agency, the hearing officer shall make recommendations to the head of the agency who shall make a decision. No decision by the head of the agency, or his representatives, shall be final without the prior approval of the Director. When the hearing is conducted by a hearing officer appointed by the Director, the hearing officer shall make recommendations to the Director, who shall make the final decision. Parties shall be furnished with copies of the hearing officer's recommendations, and shall be given an opportunity to submit their views.

§ 60–1.27 Sanctions and penalties.

The sanctions described in subsections (1), (5), and (6) of section 209(a) of the order may be exercised only by or with the approval of the Director. Referral of any matter arising under the order to the Department of Justice or to the Equal Employment Opportunity Commission shall be made by the Director.

§ 60–1.28 Show cause notices.

When the Director has reasonable cause to believe that a contractor has violated the equal opportunity clause he may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings or other appropriate action to ensure compliance should not be instituted.

§ 60–1.29 Preaward notices.

(a) *Preaward compliance reviews.* Upon the request of the Director, agencies shall not enter into contracts or approve the entry into contracts or subcontracts with any bidder, prospective prime contractor, or proposed subcontractor named by the Director until a preaward compliance review has been conducted and the Director or designated agency head or his designee has approved a determination that the bidder, prospective prime contractor or proposed subcontractor will be able to comply with the provisions of the equal opportunity clause.

(b) *Other special preaward procedures.* Upon the request of the Director, agencies shall not enter into contracts or approve the entry into subcontracts with any bidder; prospective prime contractor or proposed subcontractor specified by the Director until the agency has complied with the directions contained in the request.

§ 60–1.30 Contract ineligibility list.

The Director shall distribute periodically a list to all executive departments and agencies giving the names of prime contractors and subcontractors who have been declared ineligible under the regulations in this part and the order.

§ 60–1.31 Reinstatement of ineligible prime contractors and subcontractors.

Any prime contractor or subcontractor declared ineligible for further contracts or subcontracts under the order may request reinstatement in a letter directed to the Director. In connection with the reinstatement proceedings, the prime contractor or subcontractor shall be required to show that it has established and will carry out employment policies and practices in compliance with the equal opportunity clause.

§ 60–1.32 Intimidation and interference.

The sanctions and penalties contained in Subpart D of the order may be exercised by the agency or the Director against any prime contractor, subcontractor or applicant who fails to take all necessary steps to ensure that no person intimidates, threatens, coerces, or discriminates against any individual for the purpose of interfering with the filing of a complaint, furnishing information, or assisting or participating in any manner in an investigation, compliance review, hearing, or any other activity related to the administration of the order or any other Federal, State, or local laws requiring equal employment opportunity.

Subpart C—Ancillary Matters

§ 60–1.40 Affirmative action compliance programs.

(a) *Requirements of programs.* Each agency or applicant shall require each prime contractor who has 50 or more employees and a contract of $50,000 or more and each prime contractor and subcontractor shall require each subcontractor who has 50 or more employees and a subcontract of $50,000 or more to develop a written affirmative action compliance program for each of its establishments. A necessary prerequisite to the development of a satisfactory affirmative action program is the identification and analysis of problem areas inherent in minority employment and an evaluation of opportunities for utilization of minority group personnel. The contractor's program shall provide in detail for specific steps to guarantee equal employment opportunity keyed to the problems and needs of members of minority groups, including, when there are deficiencies, the development of specific goals and time tables for the prompt achievement of full and equal employment opportunity. Each contractor shall include in his affirmative action compliance program a table of job classifications. This table should include but need not be limited to job titles, principal duties (and auxiliary duties, if any), rates of pay, and where more than one rate of pay applies (because of length of time in the job or other factors) the applicable rates. The affirmative action compliance program shall be signed by an executive official of the contractor.

(b) *Utilization evaluation.* The evaluation of utilization of minority group personnel shall include the following:

(1) An analysis of minority group representation in all job categories.

(2) An analysis of hiring practices for the past year, including recruitment sources and testing, to determine whether equal employment opportunity is being afforded in all job categories.

(3) An analysis of upgrading, transfer and promotion for the past year to determine whether equal employment opportunity is being afforded.

(c) *Maintenance of programs.* Within 120 days from the commencement of the contract, each contractor shall maintain a copy of separate affirmative action compliance programs for each establishment, including evaluations of utilization of minority group personnel and the job classification tables, at each local office responsible for the personnel matters of such establishment. An affirmative action compliance program shall be part of the manpower and training plans for each new establishment and shall be developed and made available prior to the staffing of such establishment. A report of the results of such program shall be compiled annually and the program shall be updated at that time. This information shall be made available to representatives of the agency or Director upon request and the contractor's affirmative action program and the result it produces shall be evaluated as part of compliance review activities.

§ 60–1.41 Solicitations or advertisements for employees.

In solicitations or advertisements for employees placed by or on behalf of a prime contractor or subcontractor, the requirements of paragraph (2) of the equal opportunity clause shall be satisfied whenever the prime contractor or subcontractor complies with any of the following:

(a) States expressly in the solicitations or advertising that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin;

(b) Uses display or other advertising, and the advertising includes an appropriate insignia prescribed by the Director. The use of the insignia is considered subject to the provisions of 18 U.S.C. 701;

(c) Uses a single advertisement, and the advertisement is grouped with other advertisements under a caption which clearly states that all employers in the group assure all qualified applicants equal consideration for employment without regard to race, creed, color, or national origin;

(d) Uses a single advertisement in which appears in clearly distinguishable type the phrase "an equal opportunity employer."

§ 60–1.42 Notices to be posted.

(a) Unless alternative notices are prescribed by the Director or by the agency with the approval of the Director, the notices which prime contractors and subcontractors are required to post by paragraphs (1) and (3) of the equal opportunity clause will contain the following language and will be provided by the contracting or administering agencies:

EQUAL EMPLOYMENT OPPORTUNITY IS THE LAW—DISCRIMINATION IS PROHIBITED BY THE CIVIL RIGHTS ACT OF 1964 AND BY EXECUTIVE ORDER No. 11246

Title VII of the Civil Rights Act of 1964—*Administered by:*

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Prohibits discrimination because of Race, Color, Religion, Sex, or National Origin by Employers with 75 or more employees, by Labor Organizations with a hiring hall of 75 or more members, by Employment Agencies, and by Joint Labor-Management Committees for Apprenticeship or Training. After July 1, 1967, employers and labor organizations with 50 or more employees or members will be covered; after July 1, 1968, those with 25 or more will be covered.

ANY PERSON

Who believes he or she has
been discriminated against

SHOULD CONTACT

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
1800 G Street NW.
Washington, D.C. 20506

Executive Order No. 11246—*Administered by:*

THE OFFICE OF FEDERAL CONTRACT COMPLIANCE

Prohibits discrimination because of Race, Color, Creed, or National Origin, and requires affirmative action to ensure equality of opportunity in all aspects of employment.

By all Federal Government Contractors and Subcontractors, and by Contractors Performing Work Under a Federally Assisted Construction Contract, regardless of the number of employees in either case.

ANY PERSON

Who believes he or she has
been discriminated against

SHOULD CONTACT

THE OFFICE OF FEDERAL CONTRACT COMPLIANCE
U.S. Department of Labor
Washington, D.C. 20210

(b) The requirements of paragraph (3) of the equal opportunity clause will be satisfied whenever the prime contractor or subcontractor posts copies of the notification prescribed by or pursuant to paragraph (a) of this section in conspicuous places available to employees, applicants for employment and representatives of each labor union or other organization representing his employees with which he has a collective bargaining agreement or other contract or understanding.

§ 60–1.43 Access to records of employment.

Each prime contractor and subcontractor shall permit access during normal business hours to his books, records, and accounts pertinent to compliance with the order, and all rules and regulations promulgated pursuant thereto, by the agency, or the Director for purposes of investigation to ascertain compliance with the equal opportunity clause of the contract or subcontract. Information obtained in this manner shall be used only in connection with the administration of the order, the administration of the Civil

Rights Act of 1964, and in furtherance of the purposes of the order and that Act.

§ 60–1.44 Rulings and interpretations.

Rulings under or interpretations of the order or the regulations contained in this part shall be made by the Secretary or his designee.

§ 60–1.45 Existing contracts and subcontracts.

All contracts and subcontracts in effect prior to October 24, 1965, which are not subsequently modified shall be administered in accordance with the nondiscrimination provisions of any prior applicable Executive orders. Any contract or subcontract modified on or after October 24, 1965, shall be subject to Executive Order 11246. Complaints received by and violations coming to the attention of agencies regarding contracts and subcontracts which were subject to Executive Orders 10925 and 11114 shall be processed as if they were complaints regarding violations of this order.

§ 60–1.46 Delegation of authority by the Director.

The Director is authorized to redelegate the authority given to him by the regulations in this part. The authority redelegated by the Director pursuant to the regulations in this part shall be exercised under his general direction and control.

§ 60–1.47 Effective date.

The regulations contained in this part shall become effective July 1, 1968, for all contracts, the solicitations, invitations for bids, or requests for proposals which were sent by the Government or an applicant on or after said effective date, and for all negotiated contracts which have not been executed as of said effective date. Notwithstanding the foregoing, the regulations in this part shall become effective as to all contracts executed on and after the 120th day following said effective date. Subject to any prior approval of the Secretary, any agency may defer the effective date of the regulations in this part, for such period of time as the Secretary finds to be reasonably necessary. Contracts executed prior to the effective date of the regulations in this part shall be governed by the regulations promulgated by the former President's Committee on Equal Employment Opportunity which appear at 28 F.R. 9812, September 2, 1963, and at 23 F.R. 11305, October 23, 1963, the temporary regulations which appear at 30 F.R. 13441, October 22, 1965, and the orders at 31 F.R. 6881, May 10, 1966, and 32 F.R. 7439, May 19, 1967.

Signed at Washington, D.C., this 21st day of May 1968.

WILLARD WIRTZ,
Secretary of Labor.

[F.R. Doc. 68–6298; Filed, May 27, 1968; 8:45 a.m.]

AMENDMENT

Title 41—PUBLIC CONTRACTS AND PROPERTY MANAGEMENT

Chapter 60—Office of Federal Contract Compliance, Equal Employment Opportunity, Department of Labor

PART 60–1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

Miscellaneous Amendments

Pursuant to Executive Order 11246 (30 F.R. 12319), as amended by Executive Order 11375 (32 F.R. 14303), 41 CFR Part 60–1, as revised on May 28, 1968 (33 F.R. 7304), is hereby amended in the manner set forth below.

As these amendments concern matters relating to public contracts, neither notice of proposed rule-making, nor public participation therein, nor delay in their effective date is required by 5 U.S.C. 553. Accordingly, good cause is hereby found to dispense with notice of proposed rule-making, public participation, and delay in effective date. Therefore, these amendments shall become effective immediately.

§ 60–1.1 [Revised]

In § 60–1.1, the phrase "without regard to race, creed, color, or national origin", wherever it appears, is revised to read "without regard to race, color, religion, sex, or national origin."

§ 60–1.4 [Revised]

In § 60–1.4 (a) and (b), the phrase "without regard to race, creed, color, or national origin", wherever it appears, is revised to read "without regard to race, color, religion, sex, or national origin."

§ 60–1.8 [Revised]

In § 60–1.8(a), the phrase "on the basis of race, creed, color, or national origin", wherever it appears, is revised to read "on the basis of race, color, religion, or national origin."

§ 60–1.20 [Revised]

In § 60–1.20(a), the phrase "without regard to race, creed, color, or national origin", wherever it appears, is revised to read "without regard to race, color, religion, sex, or national origin."

§ 60–1.41 [Revised]

In § 60–1.41 (a) and (c), the phrase "without regard to race, creed, color, or national origin", wherever it appears, is revised to read "without regard to race, color, religion, sex, or national origin."

§ 60–1.42 [Revised]

In § 60–1.42(a), the phrase "because of Race, Color, Creed, or National Origin" is revised to read "because of Race, Color, Religion, Sex, or National Origin."

Section 60–1.3 is hereby amended by adding thereto a new paragraph (z) to read as follows:

§ 60–1.3 Definitions.

* * * * *

(z) The term "minority group" as used herein shall include, where appropriate, female employees and prospective female employees.

In § 60–1.7, paragraph (a)(3) is hereby revised to read as follows:

§ 60–1.7 Reports and other required information.

(a) * * *

(3) The Director, the agency or the applicant, on their own motions, may require a contractor to keep employment or other records and to furnish, in the form requested, within reasonable limits, such information as the Director, agency or the applicant deems necessary for the administration of the order.

* * * * *

(E.O. 11246, 30 F.R. 12319; E.O. 11375, 32 F.R. 14303)

Signed at Washington, D.C., this 14th day of January 1969.

WILLARD WIRTZ,
Secretary of Labor.

[F.R. Doc. 69-664; Filed, Jan. 16, 1969; 8:50 a.m.]

AMENDMENT

Title 41—PUBLIC CONTRACTS AND PROPERTY MANAGEMENT

Chapter 60—Office of Federal Contract Compliance, Equal Employment Opportunity, Department of Labor

PART 60-1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

Miscellaneous Amendments

Pursuant to Executive Order 11246 (30 F.R. 12319), as amended by Executive Order 11375 (32 F.R. 14303), 41 CFR Part 60-1, as revised on May 28, 1968 (33 F.R. 7804), is hereby amended in the manner set forth below.

As these amendments concern matters relating to public contracts, neither notice of proposed rule-making, nor public participation therein, nor delay in their effective date is required by 5 U.S.C. 553. I do not believe such procedures will serve a useful purpose here. Accordingly, these amendments shall become effective immediately.

Part 60-1 of Chapter 60 of Title 41 of the Code of Federal Regulations is hereby amended as follows:

1. § 60-1.6 is amended by revoking paragraph (d). As amended, § 60-1.6 reads as follows:

§ 60-1.6 Duties of agencies.

* * * * *

(d) [Revoked]

* * * * *

2. In § 60-1.7 paragraph (b)(1) is revised to read as follows:

§ 60-1.7 Reports and other required information.

* * * * *

(b) *Requirements for bidders or prospective contractors*—(1) *Certification of compliance with Part 60-2: Affirmative Action Programs.* Each agency shall require each bidder or prospective prime contractor and proposed subcontractor, where appropriate, to state in the bid or in writing at the outset of negotiations for the contract: (i) Whether it has developed and has on file at each establishment affirmative action programs pursuant to Part 60-2 of this chapter; (ii) whether it has participated in any previous contract or subcontract subject to the equal opportunity clause; (iii) whether it has filed with the Joint Reporting Committee, the Director, an agency, or the Equal Employment Opportunity Commission all reports due under the applicable filing requirements.

* * * * *

3. In § 60-1.20, paragraph (d) is revised to read as follows:

§ 60-1.20 Compliance reviews.

* * * * *

(d) Each agency shall include in the invitation for bids for each formally advertised nonconstruction contract or state at the outset of negotiations for each negotiated contract, that if the award, when let, should exceed the amount of $1 million or more, the prospective contractor and his known first-tier subcontractors with subcontracts of $1 million or more will be subject to a compliance review before the award of the contract. No such contract shall be awarded unless a preaward compliance review of the prospective contractor and his known first-tier $1 million subcontractors has been conducted by the compliance agency within 12 months prior to the award. If an agency other than the awarding agency is the compliance agency, the awarding agency will notify the compliance agency and request appropriate action and findings in accordance with this subsection. Compliance agencies will provide awarding agencies with written reports of compliance within 30 days following the request. In order to qualify for the award of a contract, a contractor and such first-tier subcontractors must be found to be in compliance pursuant to paragraph (b) of this section, and with Part 60-2 of these regulations.

(E.O. 11246, 30 F.R. 12319; E.O. 11375, 32 F.R. 14303)

Signed at Washington, D.C., this 16th day of June 1970.

GEORGE P. SHULTZ,
Secretary of Labor.

[F.R. Doc. 70-8344; Filed, June 30, 1970; 8:47 a.m.]

GPO 930-823

TAB C

U.S. DEPARTMENT OF LABOR
OFFICE OF FEDERAL CONTRACT COMPLIANCE
WASHINGTON, D.C. 20210

**CHAPTER 60 -- Office of Federal Contract Compliance,
Equal Employment Opportunity, Department of Labor**

(Reprint from FEDERAL REGISTER, VOL. 36, NO. 234—SATURDAY, DECEMBER 4, 1971

Title 41—PUBLIC CONTRACTS AND PROPERTY MANAGEMENT

Chapter 60—Office of Federal Contract Compliance, Equal Employment Opportunity, Department of Labor

PART 60-2—AFFIRMATIVE ACTION PROGRAMS

On August 31, 1971, notice of proposed rule making was published in the FEDERAL REGISTER (36 F.R. 17444) with regard to amending Chapter 60 of Title 41 of the Code of Federal Regulations by adding a new Part 60-2, dealing with affirmative action programs. Interested persons were given 30 days in which to submit written comments, suggestions, or objections regarding the proposed amendments.

Having considered all relevant material submitted, I have decided to, and do hereby amend Chapter 60 of Title 41 of the Code of Federal Regulations by adding a new Part 60-2, reading as follows:

Subpart A—General

Sec.
60-2.1 Title, purpose and scope.
60-2.2 Agency Action.

Subpart B—Required Contents of Affirmative Action Programs

60-2.10 Purpose of affirmative action program.
60-2.11 Required utilization analysis.
60-2.12 Establishment of goals and timetables.
60-2.13 Additional required ingredients of affirmative action programs.
60-2.14 Compliance status.

Subpart C—Methods of Implementing the Requirements of Subpart B

60 2.20 Development or reaffirmation of the equal employment opportunity policy.
60-2.21 Dissemination of the policy.
60-2.22 Responsibility for implementation.
60-2.23 Identification of problem areas by organization unit and job classification.
60-2.24 Development and execution of programs.
60-2.25 Internal audit and reporting systems.
60-2.26 Support of action programs.

Subpart D—Miscellaneous

60-2.30 Use of goals.
60-2.31 Preemption.
60-2.32 Supersedure.

AUTHORITY: The provisions of this Part 60-2 issued pursuant to sec. 201, Executive Order 11246 (30 F.R. 12319).

Subpart A—General

§ 60-2.1 Title, purpose and scope.

This part shall also be known as "Revised Order No. 4," and shall cover nonconstruction contractors. Section 60-1.40 of this Chapter, Affirmative Action Compliance Programs, requires that within 120 days from the commencement of a contract each prime contractor or subcontractor with 50 or more employees and a contract of $50,000 or more develop a written affirmative action compliance program for each of its establishments, and such contractors are now further required to revise existing written affirmative action programs to include the changes embodied in this order within 120 days of its publication in the FEDERAL REGISTER. A review of agency compliance surveys indicates that many contractors do not have affirmative action programs on file at the time an establishment is visited by a compliance investigator. This part details the agency review procedure and the results of a contractor's failure to develop and maintain an affirmative action program and then set forth detailed guidelines to be used by contractors and Government agencies in developing and judging these programs as well as the good faith effort required to transform the programs from paper commitments to equal employment opportunity. Subparts B and C are concerned with affirmative action plans only.

Relief for members of an "affected class" who, by virtue of past discrimination, continue to suffer the present effects of that discrimination must either be included in the contractor's affirmative action program or be embodied in a separate written "corrective action" program. An "affected class" problem must be remedied in order for a contractor to be considered in compliance. Section 60-2.2 herein pertaining to an acceptable affirmative action program is also applicable to the failure to remedy discrimination against members of an "affected class."

§ 60-2.2 Agency action.

(a) Any contractor required by § 60-1.40 of this chapter to develop an affirmative action program at each of his establishments who has not complied fully with that section is not in compliance with Executive Order 11246, as amended (30 F.R. 12319). Until such programs are developed and found to be acceptable in accordance with the standards and guidelines set forth in §§ 60-2.10 through 60-2.32, the contractor is unable to comply with the equal employment opportunity clause.

(b) If, in determining such contractor's responsibility for an award of a contract it comes to the contracting officer's attention, through sources within his agency or through the Office of Federal Contract Compliance or other Government agencies, that the contractor has not developed an acceptable affirmative action program at each of his establishments, the contracting officer shall notify the Director and declare the contractor-bidder nonresponsible unless he can otherwise affirmatively determine that the contractor is able to comply with his equal employment obligations or, unless, upon review, it is determined by the Director that substantial issues of law or fact exist as to the contractor's responsibility to the extent that a hearing is, in his sole judgment, required prior to a determination that the contractor is nonresponsible: *Provided*, That during any pre-award conferences every effort shall be made through the processes of conciliation, mediation and persuasion to develop an acceptable affirmative action program meeting the standards and guidelines set forth in §§ 60-2.10 through 60-2.32 so that, in the performance of his contract, the contractor is able to meet his equal employment obligations in accordance with the equal opportunity clause and applicable rules, regulations, and orders: *Provided further*, That when the contractor-bidder is declared nonresponsible more than once for inability to comply with the equal employment opportunity clause a notice setting a timely hearing date shall be issued concurrently with the second nonresponsibility determination in accordance with the provisions of § 60-1.26 proposing to declare such contractor-bidder ineligible for future contracts and subcontracts.

(c) Immediately upon finding that a contractor has no affirmative action program or that his program is not acceptable to the contracting officer, the compliance agency representative or the representative of the Office of Federal Contract Compliance, whichever has made such a finding, shall notify officials of the appropriate compliance agency and the Office of Federal Contract Compliance of such fact. The compliance agency shall issue a notice to the contractor giving him 30 days to show cause why enforcement proceedings under section 209(b) of Executive Order 11246, as amended, should not be instituted.

(1) If the contractor fails to show good cause for his failure or fails to remedy that failure by developing and implementing an acceptable affirmative action program within 30 days, the compliance agency, upon the approval of the

Director, shall immediately issue a notice of proposed cancellation or termination of existing contracts or subcontracts and debarment from future contracts and subcontracts pursuant to § 60-1.26(b), giving the contractor 10 days to request a hearing. If a request for hearing has not been received within 10 days from such notice, such contractor will be declared ineligible for future contracts and current contracts will be terminated for default.

(2) During the "show cause" period of 30 days every effort shall be made by the compliance agency through conciliation, mediation, and persuasion to resolve the deficiencies which led to the determination of nonresponsibility. If satisfactory adjustments designed to bring the contractor into compliance are not concluded, the compliance agency, with the prior approval of the Director, shall promptly commence formal proceedings leading to the cancellation or termination of existing contracts or subcontracts and debarment from future contracts and subcontracts under § 60-1.26(b) of this chapter.

(d) During the "show cause" period and formal proceedings, each contracting agency must continue to determine the contractor's responsibility in considering whether or not to award a new or additional contract.

Subpart B—Required Contents of Affirmative Action Programs

§ 60-2.10 Purpose of affirmative action program.

An affirmative action program is a set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith effort. The objective of those procedures plus such efforts is equal employment opportunity. Procedures without effort to make them work are meaningless; and effort, undirected by specific and meaningful procedures, is inadequate. An acceptable affirmative action program must include an analysis of areas within which the contractor is deficient in the utilization of minority groups and women, and further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to increase materially the utilization of minorities and women, at all levels and in all segments of his work force where deficiencies exist.

§ 60-2.11 Required utilization analysis.

Based upon the Government's experience with compliance reviews under the Executive order programs and the contractor reporting system, minority groups are most likely to be underutilized in departments and jobs within departments that fall within the following Employer's Information Report (EEO-1) designations: officials and managers, professionals, technicians, sales workers, office and clerical and craftsmen (skilled). As categorized by the EEO-1 designations, women are likely to be underutilized in departments and jobs within departments as follows: officials and managers, professionals, technicians, sales workers (except over-the-counter sales in certain retail establishments), craftsmen (skilled and semiskilled). Therefore, the contractor shall direct special attention to such jobs in his analysis and goal setting for minorities and women. Affirmative action programs must contain the following information:

(a) An analysis of all major job classifications at the facility, with explanation if minorities or women are currently being underutilized in any one or more job classifications (job "classification" herein meaning one or a group of jobs having similar content, wage rates and opportunities). "Underutilization" is defined as having fewer minorities or women in a particular job classification than would reasonably be expected by their availability. In making the work force analysis, the contractor shall conduct such analysis separately for minorities and women.

(1) In determining whether minorities are being underutilized in any job classification the contractor will consider at least all of the following factors:

(i) The minority population of the labor area surrounding the facility;

(ii) The size of the minority unemployment force in the labor area surrounding the facility;

(iii) The percentage of the minority work force as compared with the total work force in the immediate labor area;

(iv) The general availability of minorities having requisite skills in the immediate labor area;

(v) The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;

(vi) The availability of promotable and transferable minorities within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

(2) In determining whether women are being underutilized in any job classification, the contractor will consider at least all of the following factors:

(i) The size of the female unemployment force in the labor area surrounding the facility;

(ii) The percentage of the female workforce as compared with the total workforce in the immediate labor area;

(iii) The general availability of women having requisite skills in the immediate labor area;

(iv) The availability of women having requisite skills in an area in which the contractor can reasonably recruit;

(v) The availability of women seeking employment in the labor or recruitment area of the contractor;

(vi) The availability of promotable and transferable female employees within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to women.

§ 60-2.12 Establishment of goals and timetables.

(a) The goals and timetables developed by the contractor should be attainable in terms of the contractor's analysis of his deficiencies and his entire affirmative action program. Thus, in establishing the size of his goals and the length of his timetables, the contractor should consider the results which could reasonably be expected from his putting forth every good faith effort to make his overall affirmative action program work. In determining levels of goals, the contractor should consider at least the factors listed in § 60-2.11.

(b) Involve personnel relations staff, department and division heads, and local and unit managers in the goal setting process.

(c) Goals should be significant, measurable and attainable.

(d) Goals should be specific for planned results, with timetables for completion.

(e) Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.

(f) In establishing timetables to meet goals and commitments, the contractor will consider the anticipated expansion, contraction and turnover of and in the work force.

(g) Goals, timetables and affirmative action commitments must be designed to correct any identifiable deficiencies.

(h) Where deficiencies exist and where numbers or percentages are relevant in developing corrective action, the contractor shall establish and set forth specific goals and timetables separately for minorities and women.

(i) Such goals and timetables, with supporting data and the analysis thereof shall be a part of the contractor's written affirmative action program and shall be maintained at each establishment of the contractor.

(j) Where the contractor has not established a goal, his written affirmative action program must specifically analyze each of the factors listed in 60-2.11 and must detail his reason for a lack of a goal.

(k) In the event it comes to the attention of the compliance agency or the Office of Federal Contract Compliance that there is a substantial disparity in the utilization of a particular minority group or men or women of a particular minority group, the compliance agency or OFCC may require separate goals and timetables for such minority group and may further require, where appropriate, such goals and timetables by sex for such group for such job classifications and organizational units specified by the compliance agency or OFCC.

(l) Support data for the required analysis and program shall be compiled and maintained as part of the contractor's affirmative action program. This data will include but not be limited to progression line charts, seniority rosters, applicant flow data, and applicant rejection ratios indicating minority and sex status.

(m) Copies of affirmative action programs and/or copies of support data shall be made available to the compliance agency or the Office of Federal Contract Compliance, at the request of either, for such purposes as may be appropriate to the fulfillment of their responsibilities under Executive Order 11246, as amended.

§ 60–2.13 Additional required ingredients of affirmative action programs.

Effective affirmative action programs shall contain, but not necessarily be limited to, the following ingredients:

(a) Development or reaffirmation of the contractor's equal employment opportunity policy in all personnel actions.

(b) Formal internal and external dissemination of the contractor's policy.

(c) Establishment of responsibilities for implementation of the contractor's affirmative action program.

(d) Identification of problem areas (deficiencies) by organizational units and job classification.

(e) Establishment of goals and objectives by organizational units and job classification, including timetables for completion.

(f) Development and execution of action oriented programs designed to eliminate problems and further designed to attain established goals and objectives.

(g) Design and implementation of internal audit and reporting systems to measure effectiveness of the total program.

(h) Compliance or personnel policies and practices with the Sex Discrimination Guidelines (41 CFR Part 60–20).

(i) Active support of local and national community action programs and community service programs, designed to improve the employment opportunities of minorities and women.

(j) Consideration of minorities and women not currently in the workforce having requisite skills who can be recruited through affirmative action measures.

§ 60–2.14 Compliance status.

No contractor's compliance status shall be judged alone by whether or not he reaches his goals and meets his timetables. Rather, each contractor's compliance posture shall be reviewed and determined by reviewing the contents of his program, the extent of his adherence to this program, and his good faith efforts to make his program work toward the realization of the program's goals within the timetables set for completion. There follows an outline of examples of procedures that contractors and Federal agencies should use as a guideline for establishing, implementing, and judging an acceptable affirmative action program.

Subpart C—Methods of Implementing the Requirements of Subpart B

§ 60–2.20 Development or reaffirmation of the equal employment opportunity policy.

(a) The contractor's policy statement should indicate the chief executive officers' attitude on the subject matter, assign overall responsibility and provide for a reporting and monitoring procedure. Specific items to be mentioned should include, but not limited to:

(1) Recruit, hire, train, and promote persons in all job classifications, without regard to race, color, religion, sex, or national origin, except where sex is a bona fide occupational qualification. (The term "bona fide occupational qualification" has been construed very narrowly under the Civil Rights Act of 1964. Under Executive Order 11246 as amended and this part, this term will be construed in the same manner.)

(2) Base decisions on employment so as to further the principle of equal employment opportunity.

(3) Insure that promotion decisions are in accord with principles of equal employment opportunity by imposing only valid requirements for promotional opportunities.

(4) Insure that all personnel actions such as compensation, benefits, transfers, layoffs, return from layoff, company sponsored training, education, tuition assistance, social and recreation programs, will be administered without regard to race, color, religion, sex, or national origin.

§ 60–2.21 Dissemination of the policy.

(a) The contractor should disseminate his policy internally as follows:

(1) Include it in contractor's policy manual.

(2) Publicize it in company newspaper, magazine, annual report and other media.

(3) Conduct special meetings with executive, management, and supervisory personnel to explain intent of policy and individual responsibility for effective implementation, making clear the chief executive officer's attitude.

(4) Schedule special meetings with all other employees to discuss policy and explain individual employee responsibilities.

(5) Discuss the policy thoroughly in both employee orientation and management training programs.

(6) Meet with union officials to inform them of policy, and request their cooperation.

(7) Include nondiscrimination clauses in all union agreements, and review all contractual provisions to ensure they are nondiscriminatory.

(8) Publish articles covering EEO programs, progress reports, promotions, etc., of minority and female employees, in company publications.

(9) Post the policy on company bulletin boards.

(10) When employees are featured in product or consumer advertising, employee handbooks or similar publications both minority and nonminority, men and women should be pictured.

(11) Communicate to employees the existence of the contractors affirmative action program and make available such elements of his program as will enable such employees to know of and avail themselves of its benefits.

(b) The contractor should disseminate his policy externally as follows:

(1) Inform all recruiting sources verbally and in writing of company policy, stipulating that these sources actively recruit and refer minorities and women for all positions listed.

(2) Incorporate the Equal Opportunity clause in all purchase orders, leases, contracts, etc., covered by Executive Order 11246, as amended, and its implementing regulations.

(3) Notify minority and women's organizations, community agencies, community leaders, secondary schools and colleges, of company policy, preferably in writing.

(4) Communicate to prospective employees the existence of the contractor's affirmative action program and make available such elements of his program as will enable such prospective employees to know of and avail themselves of its benefits.

(5) When employees are pictured in consumer or help wanted advertising, both minorities and nonminority men and women should be shown.

(6) Send written notification of company policy to all subcontractors, vendors and suppliers requesting appropriate action on their part.

§ 60–2.22 Responsibility for implementation.

(a) An executive of the contractor should be appointed as director or manager of company Equal Opportunity Programs. Depending upon the size and geographical alignment of the company, this may be his or her sole responsibility. He or she should be given the necessary top management support and staffing to execute the assignment. His or her identity should appear on all internal and external communications on the company's Equal Opportunity Programs. His or her responsibilities should include, but not necessarily be limited to:

(1) Developing policy statements, affirmative action programs, internal and external communication techniques.

(2) Assisting in the identification of problem areas.

(3) Assisting line management in arriving at solutions to problems.

(4) Designing and implementing audit and reporting systems that will:

(i) Measure effectiveness of the contractor's programs.

(ii) Indicate need for remedial action.

(iii) Determine the degree to which the contractor's goals and objectives have been attained.

(5) Serve as liaison between the contractor and enforcement agencies.

(6) Serve as liaison between the contractor and minority organizations, women's organizations and community action groups concerned with employment opportunities of minorities and women.

(7) Keep management informed of latest developments in the entire equal opportunity area.

(b) Line responsibilities should include, but not be limited to, the following:

(1) Assistance in the identification of problem areas and establishment of local and unit goals and objectives.

(2) Active involvement with local minority organizations, women's organizations, community action groups and community service programs.

(3) Periodic audit of training programs, hiring and promotion patterns to remove impediments to the attainment of goals and objectives.

(4) Regular discussions with local managers, supervisors and employees to be certain the contractor's policies are being followed.

(5) Review of the qualifications of all employees to insure that minorities and women are given full opportunities for transfers and promotions.

(6) Career counseling for all employees.

(7) Periodic audit to insure that each location is in compliance in area such as:

(i) Posters are properly displayed.

(ii) All facilities, including company housing, which the contractor maintains for the use and benefit of his employees, are in fact desegregated, both in policy and use. If the contractor provides facilities such as dormitories, locker rooms and rest rooms, they must be comparable for both sexes.

(iii) Minority and female employees are afforded a full opportunity and are encouraged to participate in all company sponsored educational, training, recreational and social activities.

(8) Supervisors should be made to understand that their work performance is being evaluated on the basis of their equal employment opportunity efforts and results, as well as other criteria.

(9) It shall be a responsibility of supervisors to take actions to prevent harassment of employees placed through affirmative action efforts.

§ 60-2.23 Identification of problem areas by organizational units and job classifications.

. (a) An in-depth analysis of the following should be made, paying particular attention to trainees and those categories listed in § 60-2.11(d).

(1) Composition of the work force by minority group status and sex.

(2) Composition of applicant flow by minority group status and sex.

(3) The total selection process including position descriptions, position titles, worker specifications, application forms, interview procedures, test administration, test validity, referral procedures, final selection process, and similar factors.

(4) Transfer and promotion practices.

(5) Facilities, company sponsored recreation and social events, and special programs such as educational assistance.

(6) Seniority practices and seniority provisions of union contracts.

(7) Apprenticeship programs.

(8) All company training programs, formal and informal.

(9) Work force attitude.

(10) Technical phases of compliance, such as poster and notification to labor unions, retention of applications, notification to subcontractors, etc.

(b) If any of the following items are found in the analysis, special corrective action should be appropriate.

(1) An "underutilization" of minorities or women in specific work classifications.

(2) Lateral and/or vertical movement of minority or female employees occurring at a lesser rate (compared to work force mix) than that of nonminority or male employees.

(3) The selection process eliminates a significantly higher percentage of minorities or women than nonminorities or men.

(4) Application and related preemployment forms not in compliance with Federal legislation.

(5) Position descriptions inaccurate in relation to actual functions and duties.

(6) Tests and other selection techniques not validated as required by the OFCC Order on Employee Testing and other Selection Procedures.

(7) Test forms not validated by location, work performance and inclusion of minorities and women in sample.

(8) Referral ratio of minorities or women to the hiring supervisor or manager indicates a significantly higher percentage are being rejected as compared to nonminority and male applicants.

(9) Minorities or women are excluded from or are not participating in company sponsored activities or programs.

(10) De facto segregation still exists at some facilities.

(11) Seniority provisions contribute to overt or inadvertent discrimination, i.e., a disparity by minority group status or sex exists between length of service and types of job held.

(12) Nonsupport of company policy by managers, supervisors or employees.

(13) Minorities or women underutilized or significantly underrepresented in training or career improvement programs.

(14) No formal techniques established for evaluating effectiveness of EEO programs.

(15) Lack of access to suitable housing inhibits recruitment efforts and employment of qualified minorities.

(16) Lack of suitable transportation (public or private) to the work place inhibits minority employment.

(17) Labor unions and subcontractors not notified of their responsibilities.

(18) Purchase orders do not contain EEO clause.

(19) Posters not on display.

§ 60-2.24 Development and execution of programs.

(a) The contractor should conduct detailed analyses of position descriptions to insure that they accurately reflect position functions, and are consistent for the same position from one location to another.

(b) The contractor should validate worker specifications by division, department, location or other organizational unit and by job category using job performance criteria. Special attention should be given to academic, experience and skill requirements to insure that the requirements in themselves do not constitute inadvertent discrimination. Specifications should be consistent for the same job classification in all locations and should be free from bias as regards to race, color, religion, sex, or national origin, except where sex is a bona fide occupational qualification. Where requirements screen out a disproportionate number of minorities or women such requirements should be professionally validated to job performance.

(c) Approved position descriptions and worker specifications, when used by the contractor, should be made available to all members of management involved in the recruiting, screening, selection, and promotion process. Copies should also be distributed to all recruiting sources.

(d) The contractor should evaluate the total selection process to insure freedom from bias and, thus, aid the attainment of goals and objectives.

(1) All personnel involved in the recruiting, screening, selection, promotion, disciplinary, and related processes should be carefully selected and trained to insure elimination of bias in all personnel actions.

(2) The contractor shall observe the requirements of the OFCC Order pertaining to the validation of employee tests and other selection procedures.

(3) Selection techniques other than tests may also be improperly used so as to have the effect of discriminating against minority groups and women. Such techniques include but are not restricted to, unscored interviews, unscored or casual application forms, arrest records, credit checks, considerations of marital status or dependency or minor children. Where there exist data suggesting that such unfair discrimination or exclusion of minorities or women exists, the contractor should analyze his unscored procedures and eliminate them if they are not objectively valid.

(e) Suggested techniques to improve recruitment and increase the flow of minority or female applicants follow: .

(1) Certain organizations such as the Urban League, Job Corps, Equal Opportunity Programs, Inc., Concentrated Employment Programs, Neighborhood Youth Corps, Secondary Schools, Colleges, and City Colleges with high minority enrollment, the State Employment Service, specialized employment agencies, Aspira, LULAC, SER, the G.I. Forum, the Commonwealth of Puerto Rico are normally prepared to refer minority applicants. Organizations prepared to refer women with specific skills are: National Organization for Women, Welfare Rights Organizations, Women's Equity Action League, Talent Bank from Business and Professional Women (including 26 women's organizations), Professional Women's Caucus, Intercollegiate Association of University Women, Negro Women's sororities and service

groups such as Delta Sigma Theta, Alpha Kappa Alpha, and Zeta Phi Beta; National Council of Negro Women, American Association of University Women, YWCA, and sectarian groups such as Jewish Women's Groups, Catholic Women's Groups and Protestant Women's Groups, and women's colleges. In addition, community leaders as individuals shall be added to recruiting sources.

(2) Formal briefing sessions should be held, preferably on company premises, with representatives from these recruiting sources. Plant tours, presentations by minority and female employees, clear and concise explanations of current and future job openings, position descriptions, worker specifications, explanations of the company's selection process, and recruiting literature should be an integral part of the briefings. Formal arrangements should be made for referral of applicants, followup with sources, and feedback on disposition of applicants.

(3) Minority and female employees, using procedures similar to subparagraph (2) of this paragraph, should be actively encouraged to refer applicants.

(4) A special effort should be made to include minorities and women on the Personnel Relations staff.

(5) Minority and female employees should be made available for participation in Career Days, Youth Motivation Programs, and related activities in their communities.

(6) Active participation in "Job Fairs" is desirable. Company representatives so participating should be given authority to make on-the-spot commitments.

(7) Active recruiting programs should be carried out at secondary schools, junior colleges, and colleges with predominant minority or female enrollments.

(8) Recruiting efforts at all schools should incorporate special efforts to reach minorities and women.

(9) Special employment programs should be undertaken whenever possible. Some possible programs are:

(i) Technical and nontechnical co-op programs with predominately Negro and women's colleges.

(ii) "After school" and/or work-study jobs for minority youths, male and females.

(iii) Summer jobs for underprivileged youth, male and female.

(iv) Summer work-study programs for male and female faculty members of the predominantly minority schools and colleges.

(v) Motivation, training and employment programs for the hard-core unemployed, male and female.

(10) When recruiting brochures pictorially present work situations, the minority and female members of the work force should be included, especially when such brochures are used in school and career programs.

(11) Help wanted advertising should be expanded to include the minority news media and women's interest media on a regular basis.

(f) The contractor should insure that minority and female employees are given equal opportunity for promotion. Suggestions for achieving this result include:

(1) Post or otherwise announce promotional opportunities.

(2) Make an inventory of current minority and female employees to determine academic, skill and experience level of individual employees.

(3) Initiate necessary remedial, job training and workstudy programs.

(4) Develop and implement formal employee evaluation programs.

(5) Make certain "worker specifications" have been validated on job performance related criteria. (Neither minority nor female employees should be required to possess higher qualifications than those of the lowest qualified incumbent.)

(6) When apparently qualified minority or female employees are passed over for upgrading, require supervisory personnel to submit written justification.

(7) Establish formal career counseling programs to include attitude development, education aid, job rotation, buddy system and similar programs.

(8) Review seniority practices and seniority clauses in union contracts to insure such practices or clauses are nondiscriminatory and do not have a discriminatory effect.

(g) Make certain facilities and company-sponsored social and recreation activities are desegregated. Actively encourage all employees to participate.

(h) Encourage child care, housing and transportation programs appropriately designed to improve the employment opportunities for minorities and women.

§ 60–2.25 Internal audit and reporting systems.

(a) The contractor should monitor records of referrals, placements, transfers, promotions and terminations at all levels to insure nondiscriminatory policy is carried out.

(b) The contractor should require formal reports from unit managers on a schedule basis as to degree to which corporate or unit goals are attained and timetables met.

(c) The contractor should review report results with all levels of management.

(d) The contractor should advise top management of program effectiveness and submit recommendations to improve unsatisfactory performance.

§ 60–2.26 Support of action programs.

(a) The contractor should appoint key members of management to serve on Merit Employment Councils, Community Relations Boards and similar organizations.

(b) The contractor should encourage minority and female employees to participate actively in National Alliance of Businessmen programs for youth motivation.

(c) The contractor should support Vocational Guidance Institutes, Vestibule Training Programs and similar activities.

(d) The contractor should assist secondary schools and colleges in programs designed to enable minority and female graduates of these institutions to compete in the open employment market on a more equitable basis.

(e) The contractor should publicize achievements of minority and female employees in local and minority news media.

(f) The contractor should support programs developed by such organizations as National Alliance of Businessmen, the Urban Coalition and other organizations concerned with employment opportunities for minorities or women.

Subpart D—Miscellaneous

§ 60–2.30 Use of goals.

The purpose of a contractor's establishment and use of goals is to insure that he meet his affirmative action obligation. It is not intended and should not be used to discriminate against any applicant or employee because of race, color, religion, sex, or national origin.

§ 60–2.31 Preemption.

To the extent that any State or local laws, regulations or ordinances, including those which grant special benefits to persons on account of sex, are in conflict with Executive Order 11246, as amended, or with the requirements of this part, we will regard them as preempted under the Executive order.

§ 60–2.32 Supersedure.

All orders, instructions, regulations, and memoranda of the Secretary of Labor, other officials of the Department of Labor and contracting agencies are hereby superseded to the extent that they are inconsistent herewith, including a previous "Order No. 4" from this Office dated January 30, 1970. Nothing in this part is intended to amend 41 CFR 60–3 published in the FEDERAL REGISTER on October 2, 1971 or Employee Testing and Other Selection Procedures or 41 CFR 60–20 on Sex Discrimination Guidelines.

Effective date. This part shall become effective on the date of its publication in the FEDERAL REGISTER (12–4–71).

Signed at Washington, D.C., this 1st day of December 1971.

J. D. HODGSON,
Secretary of Labor.

HORACE E. MENASCO,
Acting Assistant Secretary for Employment Standards.

JOHN L. WILKS,
Director, Office of Federal Contract Compliance.

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TAB D

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U.S. DEPARTMENT OF LABOR
OFFICE OF FEDERAL CONTRACT COMPLIANCE
WASHINGTON, D.C. 20210

CHAPTER 60 -- Office of Federal Contract Compliance,
Equal Employment Opportunity, Department of Labor

(Rep · Federal Register, Vol. 35, No. 111 -- Tuesday, June 9, 1970)

George P. Shultz, Se

John L. Wilks, Director

Title 41—PUBLIC CONTRACTS AND PROPERTY MANAGEMENT

Chapter 60—Office of Federal Contract Compliance, Equal Employment Opportunity, Department of Labor

PART 60–20—SEX DISCRIMINATION GUIDELINES

On January 17, 1969, proposed guidelines were published at 34 F.R. 758 to amend Chapter 60 of Title 41 of the Code of Federal Regulations by adding a new Part 60–20. Persons interested were given an opportunity to file written data, views, or argument concerning the proposals. Also, public hearings were held on August 4, 5, and 6, to receive oral presentations from interested persons.

Having considered all relevant material, 41 CFR Chapter 60 is hereby amended by adding a new Part 60–20 to read as follows:

Sec.
60–20.1 Title and purpose.
60–20.2 Recruitment and advertisement.
60–20.3 Job policies and practices.
60–20.4 Seniority systems.
60–20.5 Discriminatory wages.
60–20.6 Affirmative Action.

AUTHORITY: The provisions of this Part 60–20 issued under sec. 201, E.O. 11246, 30 F.R. 12319, and E.O. 11375, 32 F.R. 14303.

§ 60–20.1 Title and purpose.

The purpose of the provisions in this part is to set forth the interpretations and guidelines of the Office of Federal Contract Compliance regarding the implementation of Executive Order 11375 for the promotion and insuring of equal opportunities for all persons employed or seeking employment with Government contractors and subcontractors or with contractors and subcontractors performing under federally assisted construction contracts, without regard to sex. Experience has indicated that special problems related to the implementation of Executive Order 11375 require a definitive treatment beyond the terms of the order itself. These interpretations are to be read in connection with existing regulations, set forth in Part 60–1 of this chapter.

§ 60–20.2 Recruitment and advertisement.

(a) Employers engaged in recruiting activity must recruit employees of both sexes for all jobs unless sex is a bona fide occupational qualification.

(b) Advertisement in newspapers and other media for employment must not express a sex preference unless sex is a bona fide occupational qualification for the job. The placement of an advertisement in columns headed "Male" or "Female" will be considered an expression of a preference, limitation, specification, or discrimination based on sex.

§ 60–20.3 Job policies and practices.

(a) Written personnel policies relating to this subject area must expressly indicate that there shall be no discrimination against employees on account of sex. If the employer deals with a bargaining representative for his employees and there is a written agreement on conditions of employment, such agreement shall not be inconsistent with these guidelines.

(b) Employees of both sexes shall have an equal opportunity to any available job that he or she is qualified to perform, unless sex is a bona fide occupational qualification.

NOTE: In most Government contract work there are only limited instances where valid reasons can be expected to exist which would justify the exclusion of all men or all women from any given job.

(c) The employer must not make any distinction based upon sex in employment opportunities, wages, hours, or other conditions of employment. In the area of employer contributions for insurance, pensions, welfare programs and other similar "fringe benefits" the employer will not be considered to have violated these guidelines if his contributions are the same for men and women or if the resulting benefits are equal.

(d) Any distinction between married and unmarried persons of one sex that is not made between married and unmarried persons of the opposite sex will be considered to be a distinction made on the basis of sex. Similarly, an employer must not deny employment to women with young children unless it has the same exclusionary policies for men; or terminate an employee of one sex in a particular job classification upon reaching a certain age unless the same rule is applicable to members of the opposite sex.

(e) The employer's policies and practices must assure appropriate physical facilities to both sexes. The employer may not refuse to hire men or women, or deny men or women a particular job because there are no restroom or associated facilities, unless the employer is able to show that the construction of the facilities would be unreasonable for such reasons as excessive expense or lack of space.

(f) (1) An employer must not deny a female employee the right to any job that she is qualified to perform in reliance upon a State "protective" law. For example, such laws include those which prohibit women from performing in certain types of occupations (e.g., a bartender or a core-maker); from working at jobs requiring more than a certain number of hours; and from working at jobs that require lifting or carrying more than designated weights.

(2) Such legislation was intended to be beneficial, but, instead, has been found to result in restricting employment opportunities for men and/or women. Accordingly, it cannot be used as a basis for denying employment or for establishing sex as a bona fide occupational qualification for the job.

(g) (1) Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. When, under the employer's leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time. For example, if the female employee meets the equally applied minimum length of service requirements for leave time, she must be granted a reasonable leave on account of childbearing. The conditions applicable to her leave (other than the length thereof) and to her return to employment, shall be in accordance with the employer's leave policy.

(2) If the employer has no leave policy, childbearing must be considered by the employer to be a justification for a leave of absence for a female employee for a reasonable period of time. Following childbirth, and upon signifying her intent to return within a reasonable time, such female employee shall be reinstated to her original job or to a position of like status and pay, without loss of service credits.

(h) The employer must not specify any differences for male and female employees on the basis of sex in either mandatory or optional retirement age.

(i) Nothing in these guidelines shall be interpreted to mean that differences in capabilities for job assignments do not exist among individuals and that such distinctions may not be recognized by the employer in making specific assignments. The purpose of these guidelines is to insure that such distinctions are not based upon sex.

§ 60-20.4 Seniority system.

Where they exist, seniority lines and lists must not be based solely upon sex. Where such a separation has existed, the employer must eliminate this distinction.

§ 60-20.5 Discriminatory wages.

(a) The employer's wages schedules must not be related to or based on the sex of the employees.

Note. The more obvious cases of discrimination exist where employees of different sexes are paid different wages on jobs which require substantially equal skill, effort and responsibility and are performed under similar working conditions.

(b) The employer may not discriminatorily restrict one sex to certain job classifications. In such a situation, the employer must take steps to make jobs available to all qualified employees in all classifications without regard to sex. (Example: An electrical manufacturing company may have a production division with three functional units: One (assembly) all female; another (wiring), all male; and a third (circuit boards), also all male. The highest wage attainable in the assembly unit is considerably less than that in the circuit board and wiring units. In such a case the employer must take steps to provide qualified female employees opportunity for placement in job openings in the other two units.)

(c) To avoid overlapping and conflicting administration the Director will consult with the Administrator of the Wage and Hour Administration before issuing an opinion on any matter covered by both the Equal Pay Act and Executive Order 11246, as amended by Executive Order 11375.

§ 60-20.6 Affirmative action.

(a) The employer shall take affirmative action to recruit women to apply for those jobs where they have been previously excluded.

Note. This can be done by various methods. Examples include: (1) including in itineraries of recruiting trips women's colleges where graduates with skills desired by the employer can be found, and female students of coeducational institutions and (2) designing advertisements to indicate that women will be considered equally with men for jobs.

(b) Women have not been typically found in significant numbers in management. In many companies management trainee programs are one of the ladders to management positions. Traditionally, few, if any, women have been admitted into these programs. An important element of affirmative action shall be a commitment to include women candidates in such programs.

(c) Distinctions based on sex may not be made in other training programs. Both sexes should have equal access to all training programs and affirmative action programs should require a demonstration by the employer that such access has been provided.

Effective date. This part is effective June 9, 1970.

Signed at Washington, D.C., this 2d day of June 1970.

George P. Shultz,
Secretary of Labor.

[F.R. Doc. 70-7115; Filed, June 8, 1970; 8:47 a.m.]

TAB E

U.S. DEPARTMENT OF LABOR
OFFICE OF FEDERAL CONTRACT COMPLIANCE
WASHINGTON, D.C. 20210

CHAPTER 60 -- Office of Federal Contract Compliance,
Equal Employment Opportunity, Department of Labor

*(Reprint from Federal Register, Vol.*36 *, No.*192· Saturday, October 2, 1971)

PART 60-3 Employee Testing & Other Selection Procedures

Title 41—PUBLIC CONTRACTS AND PROPERTY MANAGEMENT

Chapter 60—Office of Federal Contract Compliance, Equal Employment Opportunity, Department of Labor

PART 60-3—EMPLOYEE TESTING AND OTHER SELECTION PROCEDURES

On April 21, 1971, notice of proposed rule making was published in the FEDERAL REGISTER (36 F.R. 7532) with regard to amending Chapter 60 of Title 41 of the Code of Federal Regulations by adding a new Part 60-3, dealing with employee testing and other selection procedures. Interested persons were given 30 days in which to submit written comments, suggestions, or objections regarding the proposed amendments.

Having considered all relevant material submitted, I have decided to, and do hereby amend Chapter 60 of Title 41 of the Code of Federal Regulations by adding a new Part 60-3, reading as follows:

Sec.
60-3.1 Purpose and scope.
60-3.2 Test defined.
60-3.3 Violations of the Executive order.
60-3.4 Evidence of validity; meaning of technically feasible.
60-3.5 Minimum standards for validation.
60-3.6 Presentation of evidence of validity.
60-3.7 Use of other validity studies.
60-3.8 Assumption of validity.
60-3.9 Continued use of tests.
60-3.10 Employment agencies and state employment services.
60-3.11 Disparate treatment.
60-3.12 Retesting.
60-3.13 Other selection techniques.
60-3.14 Affirmative action.
60-3.15 Recordkeeping.
60-3.16 Sanctions.
60-3.17 Exemptions.
60-3.18 Effect on other rules and regulations.

AUTHORITY: The provisions of this Part 60-3 are issued under secs. 201, 205, 206(a), 301, 303(a), 303(b), and 403(b) of Executive Order 11246, as amended, 30 F.R. 12319; 32 F.R. 14303; 34 F.R. 12986; § 60-1.2 of Part 60-1 of this chapter.

§ 60-3.1 Purpose and scope.

(a) This order is based on the belief that properly validated and standardized employee selection procedures can significantly contribute to the implementation of nondiscriminatory personal policies, as required by Executive Order 11246, as amended. It is also recognized that professionally developed tests, when used in conjunction with other tools of personnel assessment and complemented by sound programs of job design, may significantly aid in the development and maintenance of an efficient work force and, indeed, aid in the utilization and conservation of human resource generally.

(b) (1) An examination of charges of discrimination filed with the Office of Federal Contract Compliance and an evaluation of the results of its compliance activities has revealed a decided increase in total test usage and a marked increase in testing practices which have discriminatory effects. In many cases, contractors have come to rely almost exclusively on tests as the basis for making the decision to hire, to promote, to transfer, to train, or to retain with the result that candidates are selected or rejected on the basis of test scores. Where tests are so used, minority candidates frequently experience disproportionately high rates of rejection by failing to attain score levels that have been established as minimum standards for qualification.

(2) It has also become clear that in many instances contractors are using tests as the basis for employment decisions without evidence that they are valid predictors of employee job performance. Where evidence in support of presumed relationships between test performance and job behavior is lacking, the possibility of discrimination in the application of test results must be recognized. A test lacking demonstrated validity, i.e., having no known significant relationship to job behavior, and yielding lower scores for classes protected by Executive Order 11246, as amended, may result in the rejection of many who have necessary qualifications for successful work performance.

(c) Section 202 of Executive Order 11246, as amended, requires each Government contractor and subcontractor to take affirmative action to insure that he will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. This order is designed to serve as a set of standards for contractors and subcontractors subject to Executive Order 11246, as amended, in determining whether their use of tests conforms with the requirements of the Executive Order.[1]

§ 60-3.2 Test defined.

For the purpose of this order, the term "test" is defined as any paper-and-pencil or performance measure used as a basis for any employment decision. This order applies, for example, to ability tests which are designed to measure eligibility for hire, transfer, promotion, training, or retention. This definition includes, but is not restricted to, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interests; and attitudes, personality or temperament. The term "test" also covers all other formal, scored, quantified or standardized techniques of assessing job suitability including, for example, personal history and background requirements which are specifically used as a basis for qualifying or disqualifying applicants or employees, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales and scored application forms. The term "test" shall not include other selection techniques discussed in § 60-3.13.

§ 60-3.3 Violation of Executive order.

A contractor regularly using a test which has adversely affected the opportunities of minority persons or women for hire, transfer, promotion, training, or retention violates Executive Order 11246, as amended, unless he can demonstrate that he has validated the test pursuant to the requirements of this part.

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[1] Except for the necessary differences in language arising from the different legal authority of the two agencies and for reasons of clarity, this order and the Guidelines on Employee Selection Procedures, issued earlier by the Equal Employment Opportunity Commission (35 F.R. 12333, Aug. 1, 1970) are intended to impose the same basic requirements on persons and contractors covered by each of them.

§ 60–3.4 Evidence of validity; meaning of technically feasible.

(a) Each contractor using tests to select from among candidates for hire, transfer, promotion, training, or retention shall have available for inspection evidence that the test is being used in a manner which does not violate § 60–3.3.

(b) Where technically feasible, a test should be validated for each minority group with which it is used; that is, any differential rejection rates that may exist, based on a test, must be relevant to performance on the jobs in question.

(c) The term "technically feasible" as used in paragraph (b) of this section and elsewhere in this part means having or obtaining a sufficient number of minority individuals to achieve findings of statistical and practical significance, the opportunity to obtain unbiased job performance criteria, etc. It is the responsibility of the persons claiming absence of technical feasibility to demonstrate evidence of this absence.

(1) Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.

(2) If job progression structures and seniority provisions are so established that new employees will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level, it may be considered that candidates are being evaluated for jobs at that higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it shall be considered that candidates are being evaluated for a job at or near the entry level. This point is made to underscore the principle that attainment of or performance at a higher level job is a relevant criterion in validating employment tests only when there is a high probability that persons employed will in fact attain that higher level job within a reasonable period of time.

(3) Where a test is to be used in different units of a multiunit organization and no significant differences exist between units, jobs, and applicant populations, evidence obtained in one unit may suffice for the others. Similarly, where the validation process requires the collection of data throughout a multiunit organization, evidence of validity specific to each unit may not be required. There may also be instances where evidence of validity is appropriately obtained from other companies in the same industry. Both in this instance and in the use of data collected throughout a multiunit organization, evidence of validity specific to each unit or company may not be required provided that no significant differences exist between companies, units, jobs, and applicant populations.

§ 60–3.5 Minimum standards for validation.

(a) For the purpose of satisfying the requirements of this part, empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion-related validity, such as those described in "Standards for Educational and Psychological Tests and Manuals," published by the American Psychological Association, 1200 17th Street NW., Washington, DC 20036. Evidence of content or construct validity, as defined in that publication, may also be appropriate where criterion-related validity is not feasible. However, evidence for content or construct validity should be accompanied by sufficient information from job analyses to demonstrate the relevance of the content, in the case of job knowledge or proficiency tests, or the construct, in the case of trait measures. Evidence of content validity alone will be acceptable for well-developed tests that consist of suitable samples of the essential knowledge, skills or behaviors composing the job in question. The types of knowledge, skills or behaviors contemplated here do not include those which can be acquired in a brief orientation to the job. In the case of personal history, background, educational, and work history requirements which are specifically used as a basis for qualifying or disqualifying applicants (see § 60–3.2), evidence of content or construct validity may be sufficient.

(b) Although any appropriate validation strategy may be used to develop such empirical evidence, the following minimum standards, as applicable, must be met in the research approach and in the presentation of results which constitute evidence of validity:

(1) Where a validity study is conducted in which tests are administered to applicants, with criterion data collected later, the sample of subjects must be representative of the normal or typical candidates group for the job or jobs in question. This further assumes that the applicant sample is representative of the minority population available for the job or jobs in question in the local labor market. Where a validity study is conducted in which tests are administered to present employees, the sample must be representative of the minority groups currently included in the applicant population. If it is not technically feasible to include minority employees in validation studies conducted on the present work force, the conduct of a validation study without minority candidates does not relieve any contractor of his subsequent obligation for validation when inclusion of minority candidates becomes technically feasible.

(2) Tests must be administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of test scores and to insure that scores do not enter into any judgments of employee adequacy that are to be used as criterion measures.

(3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.

(4) In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be carefully developed, and the ratings should be closely examined for evidence of bias. In addition, minorities or women might obtain unfairly low performance criterion scores for reasons other than supervisors' prejudice, as, when, as new employees, they have had less opportunity to learn job skills. In general, all criteria must be examined to ensure freedom from factors which would unfairly depress the scores of minority groups or women.

(5) Data must be generated and results separately reported for minority and nonminority groups wherever technically feasible. Where a minority group is sufficiently large to constitute an identifiable factor in the local labor market, but validation data have not been developed and presented separately for that group, evidence of satisfactory validity based on other groups will be regarded as only provisional compliance with this order pending separate validation of the test for the minority group in question (see § 60–3.9). A test which is differentially valid may be used in groups for which it is valid but not for those in which it is not valid. In this regard, where a test is valid for two groups but one group characteristically obtains higher test scores than the other without a corresponding difference in job performance, test results must be applied so as to predict the same probability of job success in both groups.

(c) In assessing the utility of a test the following considerations will be applicable:

(1) The relationship between the test and at least one relevant criterion must be statistically significant. This ordinarily means that the relationship should be sufficiently high as to have a probability of no more than 1 to 20 to have occurred by change. However, the use of a single test as the sole selection device, when that test is valid against only one component of job performance, will be scrutinized closely.

(2) In addition to statistical significance, the practical significance of the relationship between the test and criterion should also be considered. The magnitude of the relationship needed for practical significance or usefulness is affected by several factors, including:

(i) The larger the proportion of applicants who are hired for or placed on the job, the higher the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few job vacancies are available;

(ii) The larger the proportion of applicants who become satisfactory employees when not selected on the basis of the test, the higher the relationship needs to be between the test and a criterion of job success for the test to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few applicants turn out to be satisfactory;

(iii) The smaller the economic and human risks involved in hiring an unqualified applicant relative to the risks entailed in rejecting a qualified applicant, the greater the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when the former risks are relatively high.

§ 60–3.6 Presentation of evidence of validity.

The presentation of the results of a validation study must include statistical and, where appropriate, graphic representations of the relationships between the test and the criteria, permitting judgments of the test's utility in making predictions of future work behavior. (See § 60–3.5(c), concerning assessing utility of a test.) Average scores for all tests and criteria must be reported for all relevant subgroups, including minority and nonminority groups where differential validation is required. Whenever statistical adjustments are made in validity results for less than perfect reliability or for restriction of score range in the test or the criterion, or both, the supporting evidence from the validation study must be presented in detail. Furthermore, for each test that is to be established or continued as an operational employee selection instrument, as a result of the validation study, the minimum acceptable cutoff (passing) score, if any, on the test must be reported. It is expected that each operational cutoff score will be reasonable and consistent with normal expectations of proficiency within the work force or group on which the study was conducted.

§ 60–3.7 Use of other validity studies.

In cases where the validity of a test cannot be determined pursuant to §§ 60–3.4 and 60–3.5 (e.g., the number of subjects is less than that required for a technically adequate validation study, or an appropriate criterion measure cannot be developed), evidence from validity studies conducted in other organizations, such as that reported in test manuals and professional literature, may be considered acceptable when: (a) The studies pertain to jobs which are comparable (i.e., have basically the same task elements), and (b) there are no major differences in contextual variables or sample composition which are likely to affect significantly validity. Any contractor citing evidence from other validity studies as evidence of test validity for his own jobs must demonstrate that he meets requirements in paragraphs (a) and (b) of this section.

§ 60–3.8 Assumption of validity.

(a) Under no circumstances will the general reputation of a test, its author or its publisher, or casual reports of test utility be accepted in lieu of evidence of validity. Specifically ruled out are: Assumptions of validity based on test names or descriptive labels; all forms of promotional literature; data bearing on the frequency of a test's usage; testimonial statements of sellers, users, or consultants; and other nonempirical or anecdotal accounts of testing practices or testing outcomes.

(b) Although professional supervision of testing activities may help greatly to insure technically sound and nondiscriminatory test usage, such involvement alone shall not be regarded as constituting satisfactory evidence of test validity.

§ 60–3.9 Continued use of tests.

Under certain conditions where validation is required by this order, a contractor may be permitted to continue the use of a test which is not at the moment fully supported by the required evidence of validity. If, for example, evidence of criterion-related validity in a specific setting is technically feasible and required but not yet obtained, the use of the test may continue: *Provided:* (a) The contractor can cite substantial evidence of validity as described in § 60–3.7 (a) and (b); and (b) he has in progress validation procedures which are designed to produce, within a reasonable time, the additional data required. It is expected also that the contractor may have to alter or suspend test cutoff scores so that score ranges broad enough to permit the identification of criterion-related validity will be obtained.

§ 60–3.10 Employment agencies and state employment services.

A contractor utilizing the services of any private employment agency, state employment agency or any other person, agency or organization engaged in the selection or evaluation of personnel which makes its selections or evaluations of personnel wholly or partially on the basis of the results of any test shall have available evidence that any test used by such person, agency or organization is in conformance with the requirements of this order.

§ 60–3.11 Disparate treatment.

The principle of disparate or unequal treatment must be distinguished from the concept of test validation. Disparate treatment, for example, occurs where members of a group protected by Executive Order 11246, as amended, have been denied the same opportunities for hire, transfer or promotion as have been made available to other employees or applicants. Those employees or applicants who can be shown to have been denied equal treatment because of prior discriminatory practices or policies must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, no new test or other employee selection standard can be imposed upon an individual or class of individuals protected by Executive Order 11246, as amended, who, but for this prior discrimination, would have been granted the opportunity to qualify under less stringent selection standards previously in force.

§ 60–3.12 Retesting.

Contractors should provide an opportunity for retesting and reconsideration to earlier "failure" candidates who have availed themselves of more training or experience. In particular, if any applicant or employee during the course of an interview or other employment procedure claims more education or experience, that individual should be retested.

§ 60–3.13 Other selection techniques.

Selection techniques other than tests, as defined in § 60–3.2, may be improperly used so as to have the effect of discriminating against minority groups or women. Such techniques include, but are not restricted to, unscored or casual interviews, unscored application forms and unscored personal history and background requirements not used uniformly as a basis for qualifying or disqualifying applicants. Where there are data suggesting employment discrimination, the contractor may be called upon to present evidence concerning the validity of his unscored procedures regardless of whether tests are also used, the evidence of validity being of the same types referred to in §§ 60–3.4 and 60–3.5. Data suggesting the possibility of discrimination exists, for example, when there are higher rates of rejection of minority candidates than of nonminority candidates for the same job or group of jobs or when there is an underutilization of minority group personnel among present employees in certain types of jobs. If the contractor is unable or unwilling to perform such validation studies, he has the option of adjusting employment procedures so as to eliminate the conditions suggestive of employment discrimination.

§ 60–3.14 Affirmative action.

Nothing in this order shall be interpreted as diminishing a contractor's obligation under both title VII of the Civil Rights Act of 1964 and Executive Order 11246, as amended, to take affirmative action to ensure that applicants or employees are treated without regard to race, color, religion, sex, or national origin. Specifically, where substantially equally valid tests can be used for a given purpose, the contractor will be expected to use the test or battery of tests which will have the least adverse effect on the employment opportunities of minorities or women. Further, the use of tests which have been validated pursuant to this order does not relieve contractors of their obligation to take affirmative action to afford employment and training opportunities to members of classes protected by Executive Order 11246, as amended.

§ 60–3.15 Recordkeeping.

Each contractor shall maintain, and submit upon request, such records and documents relating to the nature and use of tests, the validation of tests, and test results, as may be required under the provisions of this chapter and under the orders and directives issued by the Office of Federal Contract Compliance.

§ 60–3.16 Sanctions.

(a) The use of tests and other selection techniques by contractors as qualification standards for hire, transfer, promotion, training or retention shall be examined carefully for possible indications of noncompliance with the requirements of Executive Order 11246, as amended.

(b) A determination of noncompliance pursuant to the provisions of this part shall be grounds for the imposition of sanctions under Executive Order 11246, as amended.

§ 60–3.17 Exemptions.

(a) Requests for exemptions from this order or any part thereof must be made in writing to the Director, Office of Federal Contract Compliance, Washington, D.C., and must contain a statement of reasons supporting the request. Such request shall be forwarded through and shall contain the endorsement of the head of the contracting agency. Exemption may be granted for good cause.

(b) The requirements of this part shall not apply to any contract when the head of the contracting agency determines that such contract is essential to the national security and that its award without complying with such requirements is necessary to the national security. Upon making such a determination, the agency head will notify the Director, in writing, within 30 days.

§ 60–3.18 Effect of this part on other rules and regulations.

(a) All orders, instructions, regulations, and memoranda of the Secretary of Labor, other officials of the Department of Labor and contracting agencies are hereby superseded to the extent that they are inconsistent herewith.

(b) Nothing in this part shall be interpreted to diminish the present contract compliance review and complaint investigation programs.

Effective date. This part shall become effective on the date of its publication in the FEDERAL REGISTER (10–2–71).

Signed at Washington, D.C., this 27th day of September 1971.

J. D. HODGSON,
Secretary of Labor.

[FR Doc.71–14457 Filed 10–1–71;8:46 am]

TAB F

Public Law 88-352
88th Congress, H. R. 7152
July 2, 1964

TITLE VI—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

SEC. 601. No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Rules governing grants, loans, and contracts.

Approval by President.

Termination.

SEC. 602. Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Judicial review.

60 Stat. 243
5 USC 1009.

SEC. 603. Any department or agency action taken pursuant to section 602 shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 602, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with section 10 of the Administrative Procedure Act, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that section.

SEC. 604. Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

SEC. 605. Nothing in this title shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

TAB G

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20201

August 1972

MEMORANDUM TO PRESIDENTS OF INSTITUTIONS OF HIGHER EDUCATION PARTICIPATING IN FEDERAL ASSISTANCE PROGRAMS

As you may know, on June 23, 1972, the President signed into law the "Education Amendments of 1972" (effective July 1, 1972). Title IX of this Act prohibits sex discrimination in all federally assisted education programs and amends certain portions of the Civil Rights Act of 1964. The Office for Civil Rights, Department of Health, Education, and Welfare, is presently in the process of developing regulations and guidelines to implement Title IX. For your immediate information, however, I have set forth below a brief summary of the pertinent provisions of Title IX, and have attached a copy of the law.

A. Basic Provision: Title IX of the Higher Education Act states:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal Financial assistance..."

This sex discrimination provision of Title IX is patterned after Title VI of the Civil Rights Act of 1964 which forbids discrimination on the basis of race, color, and national origin in all federally assisted programs. By specific exemption, the prohibitions of Title VI do not reach employment practices (except where the primary objective of the Federal aid is to provide employment). However, there is no similar exemption for employment in Title IX.

Therefore, effective July 1, as a condition of receiving Federal assistance, your institution must make all benefits and services available to students without discrimination on the basis of sex. As indicated below, there are exemptions to and a deferment in implementing the admissions provision. However, all other requirements of this Title are presently in effect.

B. Which Institutions are Covered:

All educational programs and activities which are offered by any institution or organization and which receive Federal financial assistance by way of grant, loan, or contract other than a contract of insurance or guaranty are covered. Title IX specifically lists the types of educational institutions which are covered. These include public and private preschools, elementary and secondary schools, institutions of vocational education, professional education, and undergraduate and graduate higher education.

C. Provisions Concerning Admissions to Schools and Colleges:

1. Certain educational institutions covered by Title IX are prohibited from sex discrimination in all of their programs and activities, including admissions to their institutions. These institutions include:

a. Institutions of vocational education (public and private).

b. Institutions of professional education (public and private).

c. Institutions of graduate higher education (public and private).

d. Public undergraduate institutions of higher education (except those which have been traditionally and continually single-sex).

2. Exemptions from the admissions provisions.

Some educational institutions covered under Title IX are exempted from complying with the prohibition against discrimination in admissions. These institutions are:

a. Private undergraduate institutions of higher education.

b. Elementary and secondary schools other than secondary vocational schools whose primary purpose is to train students in vocational and technical areas.

c. Public institutions of undergraduate higher education which have been traditionally and continually single-sex.

Schools of vocational, professional, graduate higher education, and public undergraduate higher education which are in transition from single-sex institutions to co-educational institutions are exempt from non-discrimination in admissions for specified periods of time provided each is carrying out a plan approved by HEW, under which the transition will be completed. Although all these institutions are exempt from the requirement of immediately admitting students of the previously excluded sex, they are required not to discriminate, as of the effective date of the Act (July 1, 1972), against any admitted students in any educational program or activity offered by the educational institutions.

D. Other Exemptions:

1. Religious Institutions: Institutions controlled by religious organizations are exempt if the application of the anti-discrimination provision is not consistent with the religious tenets of such organizations.

2. Military Schools: Those educational institutions whose primary purpose is the training of individuals for the military services of the United States or the Merchant Marine are exempt.

E. Provision Relating to Living Facilities: The Act allows institutions receiving Federal funds to maintain separate living facilities for persons of different sexes.

F. Who Enforces the Act: The Federal departments empowered to extend aid to educational institutions have the enforcement responsibility. (The enforcement provisions are virtually identical to those of Title VI of the Civil Rights Act of 1964). Reviews can be conducted whether or not a complaint has been filed. We presently are in the process of developing procedures under which this agency will represent all Federal agencies in the administration of Title IX, as is presently the case under Title VI of the Civil Rights Act of 1964.

G. Who Can File Charges: Individuals and organizations can challenge any unlawful discriminatory practice in a Federal program or activity by filing a complaint with the appropriate Federal agency. During the review process, names of complainants are kept confidential if possible.

H. What Happens When a Complaint Is Filed: An investigation is conducted, if warranted, and if a violation is found, informal conciliation and persuasion are first used to eliminate the discriminatory practices.

I. Formal Enforcement Procedures: If persuasion fails, the Act provides for formal hearings conducted by the Federal agency(s) involved. Such action can result in the termination or withholding of Federal financial assistance. In some instances, cases can be referred to the Department of Justice with a recommendation that formal legal action be taken. Recipients of Federal monies which have been terminated or withheld can seek judicial review of the final order issued by the agency.

J. Preferential Treatment: Institutions cannot be required to establish quotas or grant "preferential or disparate" treatment to members of one sex when an imbalance exists with respect to the number or percentage of persons of one sex participating in or receiving the benefits of federally assisted educational programs or activities. This provision is analagous to the racial imbalance provision in Title VI which states that the absence of a racial balance is not in itself proof of discrimination. However, these provisions do not mean that corrective actions may not be required to overcome past discrimination.

K. Provision Concerning Blind Students: Students cannot be denied admission on the grounds of blindness or severely impaired vision to any federally assisted education program or activity. The institution, however, is not required to provide special services for such persons.

We will provide more specific guidance on the requirements of Title IX in the near future. In the interim, should you have any questions relating to this matter, please feel free to write to me.

J. Stanley Pottinger

J. Stanley Pottinger
Director, Office for Civil Rights

Attachment

Public Law 92-318
92nd Congress, S. 659
June 23, 1972

Education Amendments of 1972

TITLE IX—PROHIBITION OF SEX DISCRIMINATION

SEX DISCRIMINATION PROHIBITED

Sec. 901. (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

Exceptions.

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) in regard to admissions to educational institutions, this section shall not apply (A) for one year from the date of enactment of this Act, nor for six years after such date in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine; and

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(b) Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this title of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

Definition.

(c) For purposes of this title an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

FEDERAL ADMINISTRATIVE ENFORCEMENT

SEC. 902. Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Report to congressional committees.

JUDICIAL REVIEW

SEC. 903. Any department or agency action taken pursuant to section 1002 shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 902, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, United States Code, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title.

PROHIBITION AGAINST DISCRIMINATION AGAINST THE BLIND

SEC. 904. No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity, but nothing herein shall be construed to require any such institution to provide any special services to such person because of his blindness or visual impairment.

EFFECT ON OTHER LAWS

SEC. 905. Nothing in this title shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

AMENDMENTS TO OTHER LAWS

78 Stat. 246, 266.

SEC. 906. (a) Sections 401(b), 407(a)(2), 410, and 902 of the Civil Rights Act of 1964 (42 U.S.C. 2000c(b), 2000c-6(a)(2), 2000c-9, and 2000h-2) are each amended by inserting the word "sex" after the word "religion".

75 Stat. 71.
77 Stat. 56.
29 USC 206.

(b)(1) Section 13(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)) is amended by inserting after the words "the provisions of section 6" the following: "(except section 6(d) in the case of paragraph (1) of this subsection)".

80 Stat. 831.

(2) Paragraph (1) of subsection 3(r) of such Act (29 U.S.C. 203(r)(1)) is amended by deleting "an elementary or secondary school" and inserting in lieu thereof "a preschool, elementary or secondary school".

(3) Section 3(s)(4) of such Act (29 U.S.C. 203(s)(4)) is amended by deleting "an elementary or secondary school" and inserting in lieu thereof "a preschool, elementary or secondary school".

INTERPRETATION WITH RESPECT TO LIVING FACILITIES

SEC. 907. Notwithstanding anything to the contrary contained in this title, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

TAB H

Public Law 92-261
92nd Congress, H. R. 1746
March 24, 1972

An Act

86 STAT. 103

To further promote equal employment opportunities for American workers.

Equal Employment Opportunity Act of 1972.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Equal Employment Opportunity Act of 1972".

Definitions.
80 Stat. 662.

SEC. 2. Section 701 of the Civil Rights Act of 1964 (78 Stat. 253; 42 U.S.C. 2000e) is amended as follows:

(1) In subsection (a) insert "governments, governmental agencies, political subdivisions," after the word "individuals".

(2) Subsection (b) is amended to read as follows:

"(b) The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 of the United States Code), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954, except that during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers."

80 Stat. 408.
68A Stat. 163.
26 USC 501.

(3) In subsection (c) beginning with the semicolon strike out through the word "assistance".

(4) In subsection (e) strike out between "(A)" and "and such labor organization", and insert in lieu thereof "twenty-five or more during the first year after the date of enactment of the Equal Employment Opportunity Act of 1972, or (B) fifteen or more thereafter,".

(5) In subsection (f), insert before the period a comma and the following: "except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision."

(6) At the end of subsection (h) insert before the period a comma and the following: "and further includes any governmental industry, business, or activity".

"Religion."

(7) After subsection (i) insert the following new subsection (j):

"(j) The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

SEC. 3. Section 702 of the Civil Rights Act of 1964 (78 Stat. 255; 42 U.S.C. 2000e–1) is amended to read as follows:

"EXEMPTION

"SEC. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

Enforcement.

SEC. 4. (a) Subsections (a) through (g) of section 706 of the Civil Rights Act of 1964 (78 Stat. 259; 42 U.S.C. 2000e-5(a)-(g)) are amended to read as follows:

"SEC. 706. (a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.

42 USC 2000e-2, 2000e-3.

Charges.

"(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the 'respondent') within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

Penalty.

State enforcement proceedings, deferral period.

"(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

"(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

Filing.

"(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Civil action.

"(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

"(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

28 USC app.

Jurisdiction.

"(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

62 Stat. 937;
74 Stat. 912;
76A Stat. 699.

Judge, designation.

"(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

"(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

28 USC app.

Relief.

"(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a)."

Back pay liability.

78 Stat. 257.
42 USC 2000e-3.
78 Stat. 259.
42 USC 2000e-5.

(b)(1) Subsection (i) of section 706 of such Act is amended by striking out "subsection (e)" and inserting in lieu thereof "this section".

(2) Subsection (j) of such section is amended by striking out "subsection (e)" and inserting in lieu thereof "this section".

42 USC 2000e-6.

SEC. 5. Section 707 of the Civil Rights Act of 1964 is amended by adding at the end thereof the following new subsection:

Transfer of functions.

"(c) Effective two years after the date of enactment of the Equal Employment Opportunity Act of 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of title 5, United States Code, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

80 Stat. 394;
85 Stat. 574.
5 USC 901.

"(d) Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

Authority.

"(e) Subsequent to the date of enactment of the Equal Employment Opportunity Act of 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 706 of this Act."

Ante, p. 104.

SEC. 6. Subsections (b), (c), and (d) of section 709 of the Civil

Rights Act of 1964 (78 Stat. 263; 42 U.S.C. 2000e-8(b)-(d)) are amended to read as follows:

State and local agencies, cooperation.

"(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

Recordkeeping; reports.

"(c) Every employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

State and Federal agencies, coordination.

"(d) In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements

Information, availability.

with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection."

SEC. 7. Section 710 of the Civil Rights Act of 1964 (78 Stat. 264; 42 U.S.C. 2000e–9) is amended to read as follows:

"INVESTIGATORY POWERS

"SEC. 710. For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 11 of the National Labor Relations Act (49 Stat. 455; 29 U.S.C. 161) shall apply."

61 Stat. 150; 84 Stat. 930.

SEC. 8. (a) Section 703(a)(2) of the Civil Rights Act of 1964 (78 Stat. 255; 42 U.S.C. 2000e–2(a)(2)) is amended by inserting the words "or applicants for employment" after the words "his employees".

(b) Section 703(c)(2) of such Act is amended by inserting the words "or applicants for membership" after the word "membership".

42 USC 2000e-3.

(c)(1) Section 704(a) of such Act is amended by inserting a comma and the following: "or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs," after "employment agency".

(2) Section 704(b) of such Act is amended by (A) striking out "or employment agency" and inserting in lieu thereof "employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs,", and (B) inserting a comma and the words "or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee" before the word "indicating".

Equal Employment Opportunity Commission.

(d) Section 705(a) of the Civil Rights Act of 1964 (78 Stat. 258; 42 U.S.C. 2000e–4(a)) is amended to read as follows:

Term.

"SEC. 705. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and, except as provided in subsection (b), shall appoint, in accordance with the provisions of title 5, United States

5 USC 101 *et seq.*

Code, governing appointments in the competitive service, such officers, agents, attorneys, hearing examiners, and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: *Provided*, That assignment, removal, and compensation of hearing examiners shall be in accordance with sections 3105, 3344, 5362, and 7521 of title 5, United States Code."

5 USC 5101, 5331.
5 USC 5332 note.
80 Stat. 415, 425, 473, 528.
78 Stat. 258.
42 USC 2000e-4.

(e) (1) Section 705 of such Act is amended by inserting after subsection (a) the following new subsection (b):

General Counsel, appointment.

"(b) (1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 706 and 707 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

Ante, p. 104.
Ante, p. 107.

"(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this title."

Repeal.

(2) Subsections (e) and (h) of such section 705 are repealed.

(3) Subsections (b), (c), (d), (i), and (j) of such section 705, and all references thereto, are redesignated as subsections (c), (d), (e), (h), and (i), respectively.

(f) Section 705(g) (6) of such Act, is amended to read as follows:

"(6) to intervene in a civil action brought under section 706 by an aggrieved party against a respondent other than a government, governmental agency or political subdivision."

42 USC 2000e-13.

(g) Section 714 of such Act is amended to read as follows:

"FORCIBLY RESISTING THE COMMISSION OR ITS REPRESENTATIVES

62 Stat. 688;
65 Stat. 721.

"SEC. 714. The provisions of sections 111 and 1114, title 18, United States Code, shall apply to officers, agents, and employees of the Commission in the performance of their official duties. Notwithstanding the provisions of sections 111 and 1114 of title 18, United States Code, whoever in violation of the provisions of section 1114 of such title kills a person while engaged in or on account of the performance of his official functions under this Act shall be punished by imprisonment for any term of years or for life."

80 Stat. 460;
84 Stat. 1604;
85 Stat. 625.

SEC. 9. (a) Section 5314 of title 5 of the United States Code is amended by adding at the end thereof the following new clause:

"(58) Chairman, Equal Employment Opportunity Commission."

(b) Clause (72) of section 5315 of such title is amended to read as follows:

"(72) Members, Equal Employment Opportunity Commission (4)."

Repeal.
84 Stat. 968.

(c) Clause (111) of section 5316 of such title is repealed.

(d) Section 5316 of such title is amended by adding at the end thereof the following new clause:

"(131) General Counsel of the Equal Employment Opportunity Commission."

SEC. 10. Section 715 of the Civil Rights Act of 1964 is amended to read as follows:

78 Stat. 265.
42 USC 2000e-14 note.

"EQUAL EMPLOYMENT OPPORTUNITY COORDINATING COUNCIL

"SEC. 715. There shall be established an Equal Employment Opportunity Coordinating Council (hereinafter referred to in this section as the Council) composed of the Secretary of Labor, the Chairman of the Equal Employment Opportunity Commission, the Attorney General, the Chairman of the United States Civil Service Commission, and the Chairman of the United States Civil Rights Commission, or their respective delegates. The Council shall have the responsibility for developing and implementing agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies. On or before July 1 of each year, the Council shall transmit to the President and to the Congress a report of its activities, together with such recommendations for legislative or administrative changes as it concludes are desirable to further promote the purposes of this section."

Report to President and Congress.

SEC. 11. Title VII of the Civil Rights Act of 1964 (78 Stat. 253; 42 U.S.C. 2000e et seq.) is amended by adding at the end thereof the following new section:

Ante, p. 103.

"NONDISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

"SEC. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

80 Stat. 378.

"(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall—

Enforcement; rules and regulations.

"(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

National and regional plan, annual review.

Progress reports, publication.

"(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

"(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

"(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

"(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

Librarian of Congress, authority.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

42 USC 2000e note.

Ante, p. 104.

"(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

78 Stat. 259.
42 USC 2000e-5.

"(d) The provisions of section 706 (f) through (k), as applicable, shall govern civil actions brought hereunder.

USC prec. title 1.

"(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government."

80 Stat. 453;
84 Stat. 1955.

SEC. 12. Section 5108(c) of title 5, United States Code, is amended by—

(1) striking out the word "and" at the end of paragraph (9);

(2) striking out the period at the end of paragraph (10) and inserting in lieu thereof a semicolon and the word "and"; and

(3) by adding immediately after paragraph (10) the last time it appears therein in the following new paragraph:

"(11) the Chairman of the Equal Employment Opportunity Commission, subject to the standards and procedures prescribed by this chapter, may place an additional ten positions in the Equal Employment Opportunity Commission in GS-16, GS-17, and GS-18 for the purposes of carrying out title VII of the Civil Rights Act of 1964."

SEC. 13. Title VII of the Civil Rights Act of 1964 (78 Stat. 253; 42 U.S.C. 2000e et seq.) is further amended by adding at the end thereof the following new section: Ante, p. 111.

"SPECIAL PROVISION WITH RESPECT TO DENIAL, TERMINATION, AND SUSPENSION OF GOVERNMENT CONTRACTS

"SEC. 718. No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government for the same facility within the past twelve months without first according such employer full hearing and adjudication under the provisions of title 5, United States Code, section 554, and the following pertinent sections: *Provided*, That if such employer has deviated substantially from such previously agreed to affirmative action plan, this section shall not apply: *Provided further*, That for the purposes of this section an affirmative action plan shall be deemed to have been accepted by the Government at the time the appropriate compliance agency has accepted such plan unless within forty-five days thereafter the Office of Federal Contract Compliance has disapproved such plan." 80 Stat. 384.

SEC. 14. The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter. Effective date. Ante, p. 104.

Approved March 24, 1972.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 92-238 (Comm. on Education and Labor) and
No. 92-899 (Comm. of Conference).
SENATE REPORTS: No. 92-415 accompanying S. 2515 (Comm. on Labor
and Public Welfare) and No. 92-416 (Comm. on
Labor and Public Welfare) and No. 92-681 (Comm.
of Conference).
CONGRESSIONAL RECORD:
Vol. 117 (1971): Sept. 15,16, considered and passed House.
Vol. 118 (1972): Jan. 19-21, 24-28, 31, Feb. 1-4, 7-9,
14-18, 21, 22, considered and passed
Senate, amended, in lieu of S. 2515.
Mar. 6, Senate agreed to conference report.
Mar. 8, House agreed to conference report.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 8, No. 13:
Mar. 25, Presidential statement.

TAB I

Office for Civil Rights Compliance Procedures

Section 206 of the Executive Order authorizes the Secretary of Labor to investigate the employment practices of any Government contractor to determine whether or not it is in compliance with the nondiscrimination and affirmative action provisions contained therein. The Secretary of Labor may also receive and investigate complaints from employees or prospective employees which allege discrimination in violation of the Executive Order. To implement these provisions, the Secretary of Labor has directed that Government agencies with compliance responsibility for specific types of Federal contractors institute programs for conducting regular compliance reviews, and institute a prompt investigation of each complaint filed with it or referred to it.

The Office of Civil Rights within the Department of Health, Education, and Welfare has been assigned responsibility by the Secretary of Labor for conducting reviews and investigations of institutions of higher education, regardless of the agency which awards the contract. Reviews and investigations are undertaken by the ten Regional Offices for Civil Rights, which have the responsibility for determining in the first instance whether a contractor is in compliance, and of recommending possible enforcement action to the Director of the Office for Civil Rights in Washington.

Section 211 of the Executive Order provides that the Secretary of Labor may direct contracting agencies not to enter into contracts unless the prospective contractor has satisfactorily complied with the provisions of the Executive Order, or has submitted a program for compliance acceptable to the Secretary of Labor. To implement this directive, the Secretary of Labor has provided that no contract of $1 million or more shall be awarded unless a pre-award clearance has been conducted by the compliance agency at least 12 months prior to the award, and unless that review has found the prospective contractor to be in compliance or able to comply as the result of the submission of an acceptable affirmative action plan. Government contracting agencies may also be separately notified by the Secretary of Labor that a contractor or prospective contractor is unable to comply with the equal employment opportunity clause for the purpose of all future awards or extensions or renewals of existing contracts.

Types of Reviews

There are a variety of circumstances which may prompt the Regional Office for Civil Rights to schedule a review or investigation of the employment practices of a college or university.

1. Pre-award reviews: When any agency of the Federal Government identifies an institution of higher education as the prospective recipient of a contract of $1 million or more, the Office for Civil Rights is responsible for conducting a review of the institution's compliance status. The requirement applies in the case of a modification of an existing contract when the amount of additional funds is $1 million or more, as well as to the extension of an existing contract or award of a new contract in this amount.

2. Reviews directed by Office of Federal Contract Compliance: The Director, Office of Federal Contract Compliance, Department of Labor, may direct the Office for Civil Rights to conduct a compliance review. For example, a specific review may be requested as a part of a coordinated government-wide review of all contractors in a specific geographical area, or may be based on the receipt by the Director of information from public or private sources indicating that a specific problem of discrimination may exist within an institution's workforce.

3. Complaint investigations: Until the summer of 1972, the Office for Civil Rights had been responsible for investigating complaints from professional employees against an institution received directly by the Office for Civil Rights, or referred to it by the Director, Office of Federal Contract Compliance. The U.S. Equal Employment Opportunity Commission, with its district offices throughout the nation, now has this responsibility. (See Guidelines, p. 14).

Institutions of higher education are subject to the provisions of Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment whether or not the employer receives Federal financial assistance. The Equal Employment Opportunity Commission is responsible for enforcing Title VII. The Office for Civil Rights continues to investigate complaints seeking relief for an affected class as well as general allegations of patterns of discrimination at an institution. Such class complaints or allegations may be factors in determining which institutions will be scheduled for review.

4. Regular compliance reviews: Reviews are also undertaken as part of a systematic program of the Office for Civil Rights to examine the employment practices of contractors for which it is assigned responsibility. Most of these reviews are routinely scheduled, although it should be noted that they may be given a higher priority as a result of information received from either public or private sources that a specific problem of discrimination against a class or classes of persons exists within the institution.

Except for pre-award clearances, all reviews and investigations are scheduled by the Regional Offices on a quarterly basis. Since the number and location of pre-award reviews cannot be anticipated by the Office for Civil Rights sufficiently in advance to permit planned scheduling, they are scheduled as required.*

Access to Information

In conducting a compliance review, the Office for Civil Rights must have adequate information about the contractor's employment practices. Such information includes data reflecting generally the employment status of existing employees and specific information on the contractor's recruitment and hiring patterns, and on its employment criteria, policies, and procedures.* It may also be necessary in particular instances to have access to specific information pertinent to employment decisions. It may also be necessary to compare the treatment of a number of individuals in order to determine factors which have affected relevant employment decisions.

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*Allegations of discrimination filed by campus organizations, or by advocacy groups such as NOW, WEAL, NAACP, and The National Urban League, which do not contain the signature of any alleged victim of the discrimination or of an authorized representative of such an individual will be handled as part of a general compliance review.

Examination of individual records could conclusively demonstrate the existence of discrimination if, for example, there is overt mention in a personnel file that race, color, national origin, religion, or sex was improperly considered in an employment decision. In such a case, examination of more general statistical data might serve as a gauge of the extent of discrimination and the scope of the required remedy. A similar approach would be warranted where initial comparison of personnel files of similarly situated employees indicates significantly different treatment corresponding with the race, color, ethnicity, religion, or sex of the employees involved. Where the focal point of an investigation becomes an individual or class instance of discrimination, the examination of certain personnel records will in most cases be necessary.

It should be made clear that access by the Office for Civil Rights to personnel information is limited to its obligation to identify and eliminate discrimination prohibited by the Executive Order, and to secure required affirmative action. The Office has no intention or authority to seek information for any other purpose. With this in mind, we expect the full cooperation of institutions of higher education in providing the Office for Civil Rights information necessary to evaluate the contractor's compliance status. See 41 CFR Sections 60-1.7(a)(3) and 60-1.43, and paragraph (5) of the equal opportunity clause.

In addition, the Office for Civil Rights' investigative responsibilties require that it have access to employees of contractors, as sources of information. The Office is therefore authorized to interview any employee, without the presence of a contractor representative, in the course of investigation or compliance activities, subject, of course, to reasonable procedures on time, place, and manner. (See 41 CFR Sections 60-1.20, 60-1.24 and 60-1.32.)

The Office will request information in reasonable form, and will not demand access to information and copying of records except during normal business hours. Failure to provide information or permit access to and copying of pertinent records constitutes noncompliance with the contractor's obligations under the Executive Order, and subjects the contractor to enforcement action, including a hearing before an independent hearing examiner. During the course of an enforcement hearing the contractor has an opportunity to contest the Office for Civil Rights' determination as to the necessity and pertinence of information it seeks.

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*See Appendix J on data requirements.

Consistent with its limited responsibilities, the Office for Civil Rights will not publicly disclose information gathered during the course of a compliance review except as indicated in the guidelines.

Conduct of Compliance Reviews*

1. Notice to the Institution

Once an institution has been selected and scheduled for review, a letter is sent by the Regional Civil Rights Director to the head of the institution advising him of the anticipated date for commencement of the review. This notification will be sent to the institution as far in advance as possible, but ordinarily at least six weeks prior to the initiation of the compliance review.** The notice will request the institution to prepare and make available either prior to or at the beginning of the review certain information which is necessary to a determination of compliance. This information ordinarily will consist of:

1. For private institutions which are subject to Revised Order No. 4, a copy of the original affirmative action program including all of the base data, analyses, documents and supporting data which were used in preparing the program. If the program has been in effect for more than six months, the updated affirmative action program and the evaluation of the program's operation since it was originally developed should be included, as well as all actions taken to correct any problems of discrimination or underutilization.

If either the original or updated program has been in effect for less than six months, and if the institution believes that actions taken under it would affect a determination of its compliance, the university may, of course, include such information in its report.

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*This section describes procedures normally followed, in the absence of unforeseen circumstances.

**An exception to this minimum notice period will be in the case of a pre-award review where the anticipated date of award of the contract or modification will not permit such notice. In these circumstances, as much advance notice as possible will be given to the institution. We have found that the normal prior notice period can generally be no more than one week in these cases. However, in most circumstances, because an institution is directly involved in contract negotiations with the Government, it can anticipate the need for an Office for Civil Rights pre-award review sufficiently in advance of the receipt of notice to proceed with preparing the information necessary for the review.

2. For public institutions specifically exempted from Order No. 4 and for private institutions which have not previously held contracts covered by the Executive Order, the notice will request that the institution prepare the basic employment information described. If such institutions have drawn conclusions from the data as to discrimination or underutilization, the institutions are free to include the information, and we strongly encourage them to do so. Information on any programs and policies which have been developed pursuant to the contractor's affirmative action obligations should also be included.

3. If the institution, whether public or private, has been previously reviewed by the Office for Civil Rights, a full report, both narrative and statistical, indicating all actions taken to correct any problems which may have been reported to the institution as a result of the prior review should be provided.

The Regional Office may request that the above described information be submitted to it prior to commencement of the on-site review, or it may request that it be available when its review team arrives to begin the on-site review. Although it would be preferable to schedule the review sufficiently in advance to permit the institution to prepare the information and forward it to the Regional Office, this will not always be possible, particularly in the case of a mandatory pre-award review.

2. On-Site Review

The purpose of a compliance review is to determine whether or not the institution is fulfilling its contractual obligations of nondiscrimination and affirmative action. In most instances, prior to any review, it is helpful for the Regional Office to have the benefit of the contractor's own analysis of its employment practices, its own evaluation of its utilization of minorities and females and its own plans and programs for overcoming problems which it has identified through these self-evaluation procedures. Indeed, if the contractor has fully complied with its obligations under 41 CFR 60-1, 60-2, 60-3 and 60-20, the review may consist of no more than an evaluation by the Regional Office of the adequacy of the contractor's analyses and conclusions and of the plans and programs which it has developed to overcome problems of discrimination and underutilization. The scope of the review will to a great extent depend on the quality of self-evaluation engaged in by the contractor prior to the on-site review.

On the basis of a review of the data prepared by the contractor, the Regional Office will select for review specific departments or other organizational units, specific job categories across departmental or organizational lines, and specific personnel practices or policies applicable within the institution as a whole. If the review team deems it necessary for the purpose of determining compliance, the review will involve the detailed examination of formal and informal personnel procedures and policies, as well as individual personnel records of employees, former employees and applicants for employment in the organizational units and job categories being analyzed. During the course of the review, the Regional Office team may wish to conduct interviews with employees, former employees and applicants for employment in those job categories or organizational units being examined and with personnel responsible for participating in the personnel decisions affecting the selected job categories or organizational units. Interviews may also be conducted with representatives of organizations active on the campus and community organizations which have an interest in equal employment opportunity. It should be emphasized that the organizational units, job categories and personnel procedures initially selected for examination may be expanded during the review if any information is developed which in the judgment of the Regional Office requires further evaluation and examination.

Based on the information gathered through these processes, preliminary findings will be developed by the review team and presented to the head of the institution or his designated representative at an exit conference. Suggestions will be offered as to how the institution can correct or remedy any problems of discrimination or underutilization discovered during the review. While it is expected that the review team will keep the contractor's representatives fully informed of problems as they are discovered during the review, the formal exit conference will assure that the contractor is fully apprised of the likely findings of the review.

The exit interview does not represent a formal presentation of the findings, but provides the contractor an opportunity to review and react to the probable findings, to submit any additional documentation, and to discuss any additional factors which may not have been brought to the reviewers' attention during the review.

3. Compliance Letter

Within approximately 30 days of the on-site review and the exit conference, the head of the institution will receive a formal letter from the Regional Civil Rights Director. The letter will include an evaluation of the institution's compliance status in each organizational unit, job category or personnel policy or procedure examined during the review. The letter will include an identification and discussion of all facts considered. The letter may also indicate specifically what must be accomplished by the contractor, suggestions as to what additional actions the contractor might take, and a maximum period of time within which the remedy must be effected.

This letter may be presented either in person by a member of the Regional Office staff or mailed to the contractor. If major problems are found, the letter will be discussed in detail with the responsible administrative officers of the institution.

4. Response by the Contractor

Within approximately 30 days of receipt of a compliance letter the contractor will be expected to respond in writing to the Regional Civil Rights Director. This response must address itself to each citation contained in the compliance letter and indicate in detail what action has been taken or is planned by the contractor on each point, including the period within which he intends to take action. If the action differs from that set forth as acceptable in the compliance letter, a full justification for the alternative must be set forth, including evidence that the alternative will be effective. If the time limit for effective action differs from that indicated in the compliance letter, the contractor must also provide evidence to support his conclusion that the action cannot be effected within the time specified by the Regional Office.

If the contractor disagrees with a finding made by the Regional Civil Rights Director, its response must state in detail the basis for disagreement and provide evidence to refute the validity of the facts upon which the finding was based, or demonstrate that the finding itself was based on an erroneous interpretation of the facts. In any such case it is expected that the contractor will provide any additional documentation which it considers appropriate to support its position.

Exceptions to the exit conference, compliance letters and response procedures will in most cases be required in pre-award reviews which carry a requirement that notice be given to the Government contracting agency regarding the prospective contractor's compliance status within 30 days of the request for clearance. In such instances every effort will be made by the Regional Office to issue the formal letter within 3 weeks of the request, which would allow the contractor one week for response. If the contractor is unable for reasons beyond his control to respond within the one week period, an extension of the 30-day clearance period will be requested by the Office for Civil Rights from the contracting agency. However, if the contractor elects not to respond within the one week or an extension cannot be secured from the contracting agency, the Office for Civil Rights will be unable to make the positive certification required for the award.

5. Evaluation of the Response

Within approximately 30 days of receipt of the institution's response, the Regional Civil Rights Director will notify the head of the institution of the results of his evaluation of the response. If the response appears to the Regional Office to be satisfactory, or if the response is sufficient to alter a previous finding, the notification will indicate the Regional Office's tentative acceptance of the response and will advise the institution that it has been forwarded to the Washington Office with a recommendation for final acceptance.

If the response is not acceptable to the Regional Office, the notification will indicate the areas of unacceptability and usually will request a conference with the contractor to attempt to resolve the differences. If a resolution cannot be achieved within approximately 30 days following this notification, the matter will be forwarded to the Washington Office with appropriate recommendations for additional conciliation efforts or enforcement action. If such recommendations are made by a Regional Office, the head of the institution will be so advised in writing by the Regional Civil Rights Director. When a case is not resolved at the level of the Regional Office, the Washington Office may determine that additional conciliation efforts are necessary before taking enforcement action. In such cases, the Director of the Office for Civil Rights will inform the institution of its opportunity to meet with the Director or his representatives for further discussion of the unresolved issues.

Conduct of Class Complaint Investigations

1. Notice to the Institution

Within approximately 10 days of the filing of a class complaint, a notice will be sent by the Regional Civil Rights Director to the head of the institution advising him of the receipt of a complaint. This notice will include the date, place and circumstances of the alleged unlawful employment practice. Notification of a scheduled review will be sent to the institution as far in advance as possible but at least two weeks prior to the initiation of the investigation.

2. On-site Investigation

At the opening of an investigation a copy of the complaint will be provided to the institution, and the institution will be advised of the procedures to be followed by the reviewer conducting the investigation. The institution will also be advised at this time of the particular personnel processes and the organizational units or job categories which will be reviewed as a part of the investigation. The investigation may involve, according to the discretion of the compliance review team, an examination of relevant data and information concerning present employees, former employees or applicants for employment in the organization units and job categories associated with the complaint. It may also include an analysis of formal and informal personnel procedures and policies associated with the particular practice being examined; interviews with employees, former employees or applicants for employment.

Based on the information gathered during the investigation, preliminary findings will be developed by the investigative team and presented to the head of the institution or his designated representative at an exit conference. As in the case of regular reviews, the exit interview does not represent a formal presentation of the findings but provides the contractor an opportunity to submit any additional documentation and discuss any additional factors which may not have been brought to the reviewers' attention during the review and which it wishes the reviewers to consider in preparing their formal findings. If the preliminary finding is that the allegations are valid, the investigative team will advise the institution as to the specific corrective action which may be required by the contractor to remedy the discriminatory treatment, and of the date by which such actions should be taken. It should be noted that while a formal finding is not made at the exit conference, this should not preclude the contractor's acting to remedy a matter brought to his attention during the exit conference, prior to receipt of formal findings.

It should be emphasized that the law protects individuals who have complained of discrimination from harassment by the employer because of that complaint. Instances of harassment or reprisals brought to the attention of the Office for Civil Rights may be considered a basis for enforcement action. The same criteria apply to relatives of complainants and to those who aid in a Government inquiry.

Steps Following Non-compliance Determinations

Show Cause Notices

When the Director of the Office for Civil Rights has reasonable cause to believe that a contractor has violated the equal opportunity clause, he may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement procedures or other appropriate action to ensure compliance should not be instituted. (See 41 CFR 60-1.28) A show cause notice will in all cases be issued to the contractor when it is found that a contractor does not have an affirmative action program or that the program is not acceptable under the standards contained in 41 CFR 60-2.10 through 60-2.32. The Department of Labor recently issued a Notice of Proposed Rule-Making to require that a show cause notice be issued when there is a substantial deviation from an affirmative action program (37 FR 17766). In other enforcement circumstances, a show cause notice is not required and its use is at the sole discretion of the Director, Office of Federal Contract Compliance, Department of Labor.

Show cause notices may also be issued by the Regional Civil Rights Director as a part of letters of findings following either a compliance review or a complaint investigation if it is found that an institution which is required to have developed an affirmative action program has not done so, or that the affirmative action program which has been developed by the institution does not conform to the guidelines contained in 41 CFR 60-2.10 through 60-2.32.

Sanctions and Penalties

The Executive Order authorizes the imposition of the following sanctions and penalties against contractors who have failed to comply with the provisions of the Executive Order and the implementing regulations:

1. Publication of the name of the non-complying contractor.

2. Cancellation, termination, and suspension of contracts or portions of contracts.

3. Debarment from future contracts or extensions or modifications of existing contracts.

In addition, the Director, Office of Federal Contract Compliance, may in some cases recommend to the Department of Justice or the Equal Employment Opportunity Commission the initiation of appropriate judicial proceedings, including criminal proceedings by the Department of Justice for providing false information.

Prior to the imposition of any sanctions and penalties, reasonable efforts within a reasonable time must be made to secure compliance through conference, conciliation, mediation and persuasion, and the contractor must be afforded an opportunity for a hearing. We have briefly described the processes of conference, conciliation, mediation and persuasion above in outlining the compliance review and complaint investigation procedures. When these efforts fail to produce corrective action adequate to overcome any instance of noncompliance, appropriate administrative proceedings leading to the imposition of sanctions and penalties will be initiated. The first step in this process will be a letter giving contractors 10 days in which to comply or request a hearing before an impartial hearing officer. The procedures for imposition of the sanctions and penalties are detailed in 41 CFR 60-1.26, 60-1.27, 60-1.30 and 60-1.31.

A hearing adjudicates whether the contractor is out of compliance with the requirements of the Executive Order and its regulations. Except to the extent that applicable law provides otherwise, the burden of proving noncompliance is on the Government. Hearings are conducted in accordance with the Department's rules for such proceedings, published at 45 CFR Part 82 and 37 Fed. Reg. 7323. These rules also prescribe the procedures for intervention of interested parties in these proceedings (section 82.6), and for review within the Department of the decision of the hearing officer (section 82.37).

The Office for Civil Rights is responsible for advising HEW contracting agencies as to whether contractors for which they are responsible can comply with the requirements of the equal employment opportunity clause contained in each Federal contract over $10,000. Such advice is binding upon the contracting officers in their determinations of the responsibility of prospective contractors. OFCC is responsible for advising other agencies on the contractor's compliance status. Such advice is ordinarily based upon the information and findings of the OCR review.

If the Office for Civil Rights has determined, pursuant to the review and enforcement procedures outlined in this and the preceding section, that a contractor is unable to comply with its equal employment opportunity obligations, the Director may so advise all contracting agencies.* This notification may or may not occur in the context of a response to a request for clearance of a new award or of the modification or extension of an existing contract.**

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* 41 CFR 60-2.2. provides in part that ''[Any contractor required . . . to develop an affirmative action program . . . who has not complied fully . . . is not in compliance with Executive Order 11246 . . .'' and ''is unable to comply with the equal employment opportunity clause'' unless the government can ''otherwise affirmatively determine that the contractor is able to comply with his equal employment obligations or, unless, upon review, it is determined by the Director [Office of Federal Contract Compliance] that substantial issues of law or fact exist as to the contractor's responsibility to the extent that a hearing is, in his sole judgment, required prior to a determination. . . .''

Notification of ''inability to comply'' to contracting agencies by the Director of the Office for Civil Rights has the effect of denying or deferring the extension of an existing contract or the award of a new contract which may arise. In such cases, the contractor is entitled to have an immediate hearing on its compliance status concurrent with the second denial or deferral of a contract award.

Procedures for a formal hearing, including those for cancellation or termination of existing contracts and debarment from further contracts, are set forth in detail in 41 CFR 60-1.26(b) (Tab B), and in Chapter 27-10 of the Department of Health, Education, and Welfare General Administration Manual (34 FR 1276).

** 41 CFR 60-1.20(d) provides that contracts of $1 million or more, including modifications or extensions of existing contracts which involve the allocation of additional funds in the amount of $1 million or more, can not be awarded without a finding that the prospective contractor is complying with the provisions of the Executive Order and the implementing regulations.

TAB J

Data Gathering and Analysis - Suggested Procedures

A necessary prerequisite to the development of a meaningful affirmative action program is the identification and analysis of problem areas inherent in minority and female employment, and an evaluation of the opportunities for utilization of minorities and women in the contractor's workforce. (See Guidelines p. 2 for an explanation of the obligations of public contractors.)

The first step in the contractor's analysis of its workforce is to determine where policies and practices have had the effect of denying equal employment opportunity and benefits to certain groups of persons on a discriminatory basis. This will necessitate the development of a comprehensive inventory of all employees.

An employer must then organize this inventory so as to determine:

1. any patterns of job classification and assignment identifiable by sex or minority group;
2. any job classification or organizational unit where women and minorities are not employed or are underutilized (see Guidelines p. 3 for a definition of underutilization); and
3. any patterns of difference in rate of pay, status, type of appointment, termination, or rates of advancement within job classifications or organizational units which are identifiable by sex or minority group.

The results of a contractor's analysis should be shared and discussed with personnel relations staff, with department and divisional heads and with other supervisors responsible for academic and nonacademic personnel to determine whether patterns suggesting deficiencies in equal employment exist and, if so, why. At this stage of evaluation, some institutions have set up task forces to assist in identifying discriminatory patterns and practices. This has proven particularly useful in the area of academic employment, where the faculty has traditionally had a principal responsibility for matters relating to faculty status.

A. Basic Data File

The contractor must first establish a basic data file on its employees. This is the primary source material of the institution and need not be submitted to the Office for Civil Rights, although the contractor may be required at some time to supply OCR with this information in order to determine the accuracy in the compilation of the data.

The basic file should contain the following for each employee:

(1) name and/or identification number (See discussion below)
(2) sex
(3) ethnic identification (Negro, Spanish-surnamed, American Indian, Oriental. All others, including Caucasians, should be identified as ''other'')
(4) year or date of birth, or age
(5) current salary (full-time annual equivalent)
(6) current job family or generic job family
(7) current job title
(8) personnel action resulting in current job title (new hire, promotion, transfer, demotion)
(9) date of personnel action resulting in current title (years in current job)
(10) previous job title
(11) employment status (full-time, part-time, tenured, non-tenured, etc.)
(12) educational level
(13) organizational unit where employed
(14) date of hire

The contractor may wish to compile this basic data in the form of a master list, or computer printout, arranged by department, within department by job classification, and within job classification by length of service and salary. The Office for Civil Rights will not normally require that these printouts be submitted, if the summaries described below are compiled in such a way as to be sufficient to determine compliance.

In collecting data on employees, it is not necessary to identify the employees by name. Where there is an objection raised by an individual to providing data on his or her race or sex, it should be made clear that individuals are not themselves legally bound to report such information. Where an inventory by voluntary submission of such data on the part of employees is not obtained, however, employers must rely on their supervisors to make identification on the basis of their ''best knowledge'' of employees. It is clear that no inventory method, and particularly the latter one, will provide perfect accuracy. Nevertheless, the institution must devise some method which will produce reasonably accurate data upon which to base its identification of problems or deficiencies and to develop a responsive affirmative action program.

B. Organization

The basic data on all employees must be summarized for ready analysis in the following manner:

1. by department, a list of each job classification in descending order (e.g. professor, associate professor; secretary 1, secretary 2, etc.) showing the numbers by sex for each racial and ethnic group, as well as cumulative figures for minorities and for females generally.

2. by job classification, within the entire institution, showing the numbers by sex for each ethnic group, as well as cumulative figures for minorities and for females generally. In order to satisfy this requirement an institution must establish an organization chart, broken down by career ladders; it must also classify all job titles and organize them into career ladders. The duties, educational requirements, experiential requirements and pay ranges for each position must be made reasonably explicit.

3. by department, the mean salary in each job classification, by sex for each racial and ethnic group.

4. by job classification, across department lines, the mean salary in each classification, by sex for each racial and ethnic group.

C. Required Analysis

1. Availability of Women and Minorities

A unique aspect of equal employment opportunity under the Eexecutive Order is the required compilation of availability data on women and minorities for use as a measure of the contractor's equal employment opportunity. By comparing availability data with current employees, the contractor has an indication of how representative its workforce is of the persons qualified for employment in its institution.

The Department of Labor's Revised Order No. 4 (41 CRF 60-2.11(a) (1 and 2) contains explicit guidelines for constructing an availability index for minorities and an availability index for women. These indices are particularly applicable in the case of nonacademic personnel.

The demographic data needed to develop these estimates can generally be secured through the Census Bureau, the Department of Labor's Bureau of Labor Statistics and its Women's Bureau, and from city, county and state governments, including planning commissions and public employment agencies. Estimates concerning minority population, workforce and requisite skills may often be obtained from local Chambers of Commerce, union organizations, employer associations, local educational institutions, community organizations, and minority and women's advocacy groups such as the Urban League and NOW. The community organizations serving minorities and women will often be the closest to the situation and thus should be contacted by the contractor in preparing estimates of availability.

For academic personnel the development of availability figures is slightly different, because the recruiting area will vary from institution to institution. It may be a national or even international one. Because the skills required for a particular position are often quite specialized, accurate information on availability may be more difficult to obtain.

OCR recommends the following procedure for determining availability figures for women and minorities for academic positions:

Many disciplinary associations and professional groups have data that show percentages of racial and national origin minorities available in certain fields, and a 1968 study by the Ford Foundation (Office of Reports) provides percentages of Negroes holding doctorates. To determine the number of women available for senior level positions, the Office recommends that the contractor use data available from the National Register of Scientific and Technical Personnel prepared by the National Science Foundation, and the U.S. Office of Education's annual reports on earned degrees. Another source is the National Research Council of the National Academy of Science. This data has been compiled by sex, but is now being compiled by race, as well. The NSF data is broken down by sex, specialty and subspecialty, highest degree, years of professional experience, and primary work activity. The OE data is broken down by sex, degree earned, school granting degree, and specialty. For women in junior positions, the Office recommends that the contractor consider the OE annual report of earned degrees for the last 5 years and current graduate school enrollments.

To the extent that an institution makes a practice of employing its own graduates, the number and percentage of graduate degrees which it has itself awarded to women and minorities in the past ten years or so should be reflected in the goals which it sets for its future faculty appointments.

For academic employees the basic national data on earned doctoral degrees will provide the basis for a utilization analysis of a contractor's workforce, unless the contractor can otherwise demonstrate that the labor market upon which it draws is significantly different from this base. For example, some institutions appoint a large number of new faculty from a particular group of graduate schools; such institutions may use data obtained from these schools to determine the availability of women and minorities. If the annual output of women and minorities from the primary feeder schools exceeds the national average, the contractor will be expected to use the higher figures to determine availability. If the output from the feeder schools is less than the national average, the institution will be expected to justify its use of such recruitment sources, or use the higher figures to determine eligibility.

2. Comparison of Current Workforce with Availability Data

The next step for the contractor is to compare the number of women and minorities in its current workforce with their availability in the market from which it can reasonably recruit. This comparison must be by comparable job categories. Wherever the comparison reveals that a hiring unit of the university (a department or other section) is not employing minorities and women to the extent that they are available and qualified for work, it is then required to set goals to overcome this situation.

Goals should be set so as to overcome deficiencies in the utilization of minorities and women within a reasonable time. In many cases this can be accomplished within 5 years; in others more time or less time will be required.

Goals may be set in numbers or percentages, and should reflect not only the number of new hires but also the projected overall composition of the work force in the given unit.

It is necessary to set goals that will overcome underutilization in the institution's work force within a reasonable period of time, not merely to set goals for new hires based on current availability.

In many institutions the appropriate unit for goals is the school or division, rather than the department. While estimates of availability in academic employment can best be determined on a disciplinary basis, anticipated turnover and vacancies can usually be calculated on a wider basis. While a school, division or college may be the organizational unit which assumes responsibility for setting and achieving goals, departments which have traditionally excluded women or minorities from their ranks are expected to make particular efforts to recruit, hire and promote women and minorities. In other words, the Office for Civil Rights will be concerned not only with whether a school meets its overall goals, but also whether apparent general success has been achieved only by strenuous efforts on the part of a few departments.

3. Salary Analysis

A salary analysis is required for all employees. The basic question to be answered by such an analysis is whether there is a difference in the salary of employees with the same job title that can be attributed to their sex or minority status. However, before this analysis is done, job titles must be compared and overlapping ones merged so that persons doing the same work with different job titles benefit from the salary analysis.

The most effective means of undertaking a meaningful salary analysis may vary from institution to institution. Factors which are taken into consideration in determining salary may vary among and even within institutions. The purpose and function of every salary analysis should be to determine whether women or minority group persons are being paid lower wages for performing the same or essentially the same duties.

D. Additional types of analyses which are useful in determining compliance

1. Locations Analysis

In an attempt to prevent the development of segregated job titles in any physical location, a locations report is suggested. This report should examine the race-sex--national origin composition of each job title in each major organizational unit of the institution, e.g., athletic department, health services, hospitals, central administration, deans' offices, building and grounds, etc.

This analysis may not be revealing where the units involved are small or where the numbers of minorities or women in the job title are few. But where a university discovers that it has one minority or sex group clustered in any one unit, even though there are members of the opposite sex or of other minorities in the same job title clustered elsewhere, corrective action must be taken. If a university discovers the reason for this concentration, it can prevent it from recurring or continuing by altering its policies.

This type of analysis may also be useful in determining at what point in the organizational structure women or minorities cease to move upward, and what obstacles to upward mobility may exist within the contractor's organizational structure.

2. Promotion Analysis

A university may also compile data to determine the success or failure of women and minorities in attaining promotion or tenure. One possible method is to compare the time spent prior to gaining promotion or tenure by males and by females of similar experience or by minorities and by others of similar experience. Another comparison could show the percentage in each group eligible for and those granted promotion or tenure. Wide variance among sex-ethnic-racial groups would necessitate further analysis.

E. Testing and Test Validation

41 CFR 60-3 (''Employee Testing and Other Selection Procedures'') requires all contractors to validate tests used as a basis for employment decisions, in order to make certain they are not discriminatory, and provides that contractors may be required to validate other employee selection techniques.

The term ''test'' is defined as any paper-and-pencil or performance measure used as a basis for any employment decision and all other formal, scored, quantified or standardized techniques of assessing job suitability.

The latter techniques include personal history and background requirements which are specifically used as a basis for qualifying or disqualifying applicants or employees, specific educational or work history requirements, scored interviews, biographical information blanks, interviewer's rating scales, and scored application forms.

If a test or selection technique is determined to have a disproportionate impact on minority persons or women, such test or selection technique must be validated pursuant to the regulations cited above.

A testing report should contain the following data: name of test, publisher, and publication date of the test, the groups on whom it was validated and when and where, the groups to whom it is administered by the contractor and in what employment decisions it is used, the average score, the standard deviation for each race-sex group taking the test and the number of people in each race-sex group taking the test. Data should be kept indicating the scores, standard deviation, and number of people in each race-sex group who took the test and subsequently received a favorable personnel action (hired, promoted, placed in new job) in part because of their test scores. Based on the analysis of this data, the contractor must determine where tests must be eliminated or modified.